Petition

81-724

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

v.

WHITTEN H. ANDERSON, and RONALD R. THOMAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RICHARD A. HELM
(Counsel of Record)
CHARLES P. FLYNN
NELSON G. PAGE
BURR, PEASE & KURTZ
810 N Street
Anchorage, Alaska 99501
Telephone: (907) 279-2411
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the courts of the State of Alaska can determine the validity of unpatented federal mining claims in an action for damages in state court, prior to determination of the validity of the claims by the Department of the Interior.

II. Whether the Superior Court of the State of Alaska improperly instructed the jury on federal mining law by failing to specify that a mineral, to be discoverable, must be marketable at the time of the alleged discovery.

PARTIES

The parties to the proceeding in the Alaska courts are all listed in the caption of this case in this Court. Pursuant to Rule 21.1(b) and Rule 28.1 of the Supreme Court of the United States, the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner are as follows:

Alyeska Pipeline Service Company is owned by Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company; Amerada Hess Pipeline Corporation is wholly owned by Amerada Hess Corporation; Arco Pipe Line Company is wholly owned by Atlantic Richfield Company; BP Pipelines Inc. is wholly owned by BP North America Inc., which is wholly owned by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd, which is wholly owned by The British Petroleum Company Limited; Exxon Pipeline Company owns an interest in Dixie Pipeline Company, Plantation Pipeline, Qualbank, Inc., West Shore Pipe Line Company, and Yellowstone Pipe Line Company and is wholly owned by Exxon Corporation; Mobil Alaska Pipeline Company is wholly owned by Mobil Oil Corporation, which is wholly owned by Mobil Corporation; Phillips Alaska Pipeline Corporation is wholly owned by Phillips

Investment Company; Sohio Pipe Line Company is wholly owned by the Standard Oil Company (an Ohio Corporation) in which a controlling interest is held by British Petroleum (Overzee) B.V., which is wholly owned by British Petroleum N.V., which is wholly owned by BP International Ltd, which is wholly owned by The British Petroleum Company Limited; and Union Alaska Pipeline Company is wholly owned by Union Oil Company of California.

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No. _____

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v.

WHITTEN H. ANDERSON, and RONALD R. THOMAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioner, Alyeska Pipeline Service Company, respectfully requests that a writ of certiorari issue to review the order of the Supreme Court of the State of Alaska dated June 5, 1981, (Appendix B) affirming the decision of the Superior Court of the State of Alaska, Fourth Judicial District at Fairbanks, to refuse a stay requested pending determination by the Bureau of Land Management of the validity of the respondents' mining claims under federal mining law and affirming the superior court's jury instructions on the question of marketability.

OPINIONS BELOW

The relevant opinions are attached as appendices as follows:

Appendix A — Supreme Court of Alaska, Order dated July 14, 1981, denying Petitioner's Motion for Reconsideration in *Alyeska Pipeline Service Company, Appellant, Cross-Appellee, v. Whitten H. Anderson and Ronald R. Thomas, Appellees, Cross-Appellants.*

Appendix B — Supreme Court of Alaska, Opinion Number 2364, dated June 5, 1981, in *Alyeska Pipeline Service Company, Appellant, Cross-Appellee, v. Whitten H. Anderson and Ronald R. Thomas, Appellees, Cross-Appellants*, reported at 629 P.2d 512 (1981).

Appendix C — Supreme Court of Alaska, Order dated October 8, 1979, denying Petitioner's Motion for Stay of Appellate Proceedings in *Alyeska Pipeline Service Company, Appellant, Cross-Appellee, v. Whitten H. Anderson and Ronald R. Thomas, Appellees, Cross-Appellants.*

Appendix D — Transcript, Superior Court of the State of Alaska, Fourth Judicial District at Fairbanks, Order entered October 23, 1978 denying Petitioner's Motion for a Stay Pending Administrative Determination of the Validity of the Respondents' Claim in *Whitten H. Anderson and Ronald R. Thomas, Plaintiffs, v. Alyeska Pipeline Service Co., Defendant.*

JURISDICTION

The order of the Superior Court denying petitioner's motion for stay was entered orally on October 23, 1978. (Transcript, Appendix D, at 40a) The judgment was entered by the Superior Court on November 3, 1978. The order of the Supreme Court of Alaska affirming the judgment was entered on June 5, 1981, (Appendix B) and became final under the laws of the State of Alaska on July 14, 1981, upon denial of petitioner's motion for reconsideration. (Appendix A) The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant federal statutes involved are Section 9 of the Act of February 27, 1865, 13 Stat. 441, 30 U.S.C. § 53, which provides as follows:

> No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title shall be affected by the fact

> that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

and Section 1 of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22, which provides as follows:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

and Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611, which provides as follows:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611 to 615 of this title means agatized, opalized, petrified or silicified wood, or any material formed by the replacement of wood by silica or other matter.

STATEMENT OF THE CASE

Whitten H. Anderson and Ronald R. Thomas staked a claim on federal land at Mile 34.5 of the Elliott Highway north of Fairbanks, Alaska, on September 6, 1966. Thereafter, they filed affidavits of annual labor as required by federal mining law.

Anderson and Thomas staked their claim as a building stone claim under 30 U.S.C. § 22 and 30 U.S.C. § 611. To satisfy the requirements of those provisions of the federal mining laws, the respondents were required to demonstrate that their rock was "marketable" and that it contained some property giving it "distinct and special value." Over the ten-year period prior to the actions which gave rise to this lawsuit, Anderson and Thomas made a total of one sale of five or six tons of stone for a total profit of approximately $160. Between 1966 and 1977 they reported expending $1,320 in annual assessment work.

In 1976, a subcontractor of Alyeska Pipeline Service Company removed rock from the mining claim for use as gravel aggregate in construction of the Trans-Alaska Pipeline System. The gravel was removed after the Alyeska subcontractor asked for permission to do so from state highway personnel, who were also removing gravel from the site. The subcontractor believed that the state personnel had authority to allow him to remove the material. Anderson discovered the gravel being removed some time in the spring of 1976. Thereafter, in October of 1976, Anderson complained to Alyeska. The subcontractor was immediately instructed by Alyeska not to take more material from the site, although six truckloads of material were taken thereafter.

Anderson and Thomas subsequently filed this lawsuit, alleging that Alyeska had converted materials which they owned under federal mining law. Prior to trial, the superior court ruled that Anderson and Thomas would have to prove that their mining claim was valid under the laws of the United States as a condition precedent to being able to recover from

Alyeska. (Transcript, Appendix D, at 41a) This ruling was not appealed, and all parties to the lawsuit proceeded under the assumption that the plaintiffs would have no right to recovery if their mining claim was not valid.

Approximately four weeks before the trial, it was learned that, at the request of the State of Alaska, the Bureau of Land Management had begun an investigation of the validity of the Greenstone No. 1 Claim. A validity investigation is the first step toward a challenge of the validity of a claim by the United States. Upon learning of the investigation, Alyeska requested that the superior court stay the trial until a determination of the validity of the mining claim could be made by the Bureau of Land Management. In requesting the stay, Alyeska pointed out (1) that the Bureau of Land Management was the expert administrative tribunal set up for the purpose of determining the validity of mining claims under federal law; (2) that the issues before the Bureau of Land Management would be identical to the issues to be decided in the state court forum; and (3) that failure to grant the stay might result in inconsistent decisions on the same question, and subject Alyeska to double liability, first to the plaintiffs in the state action, and second, if it were determined by the Bureau of Land Management that the mining claim was invalid, to the United States government. At oral argument on the motion, on October 23, 1978, the superior court judge denied the motion for a stay. (See Transcript, Appendix D, at 40a)

At trial, substantial testimony was taken regarding whether the stone from the respondents' mining claim met the various marketability and uniqueness requirements of the federal mining laws. This was, in fact, the primary issue in the case. The case was submitted to the jury on that question and the jury was given instructions regarding applicable provisions of federal mining statutes and the validity of mining claims. Petitioner submitted proposed jury instructions on these points.(Appendix H) Petitioner's instructions were not given, over the objections of petitioner. (Transcript, Appendix D, at 41a-43a) The jury returned a verdict in favor of the plaintiffs,

in the amount of approximately $1.9 million.[1] The failure to grant a stay and the inadequacy of the jury instructions were points on appeal to the Alaska Supreme Court.

On September 10, 1979, Alyeska filed a motion with the Alaska Supreme Court requesting that a stay of appellate proceedings be instituted pending a determination of the administrative investigation into the validity of the respondents' mining claim. Again, Alyeska pointed out that the decision of the state courts was not binding on the federal government, and that Alyeska was being exposed to the possibility of double liability on the same body of facts.

On October 8, 1979, Alyeska's motion for a stay was denied by the Alaska Supreme Court. (Appendix C)

On October 10, 1979, the Fairbanks District Office of the Bureau of Land Management issued its report on the validity examination of the Greenstone No. 1 Mining Claim. The investigation was conducted by John J. Kato, Yukon area geologist for the Fairbanks District Office of the Bureau of Land Management. The examiner concluded that the claim of the plaintiffs was deficient in four out of the five essential re-

[1]On appeal, Justice Matthews dissented from the affirmance of the damages award:

> Reviewing the record in the present case leaves me with a firm conviction that the trial judge abused his discretion in failing to order a remittitur or grant a new trial. It is clear that the jury either arrived at its damage award in an inappropriate manner or simply ignored the evidence and awarded an excessive amount.
>
> The basic principle of damages is that the damaged party should be put in the position in which he would have been but for the tort. Restatement (Second) of Tort § 901, Comment a, (1977). Here if Alyeska had never touched the plaintiffs' property, plaintiffs at best could have been selling 200 tons of rock per year at about $80.00 per ton which would mean that they would gross around $16,000.00 per year. This sum need not be offset for extraction costs under the harsh rule of damages. What sum is necessary to produce $16,000.00 per year forever? It depends on the interest rate of course; 7.5% is certainly fair from the plaintiffs' standpoint. If that rate is used the total award should not exceed $240,000.00. Because this sum is so at variance with the $1,900,000.00 actually awarded I do not think that the award can be allowed to stand.

(Slip Opin., Appendix B, at 34a-35a)

quisites to a valid mining claim. Specifically, the examiner found that the stone taken from the plaintiffs' mining claim did not exhibit unique or inherent properties sufficient to endow it with an economic or marketability advantage over competitive stone in the marketing area; that the limited sales in the 13-year period since the claim had been initially located were not sufficient to demonstrate that there had been a continuous market for the stone;[2] that there were insufficient reserves of stone remaining on the mining claim to serve existing markets; and that the land on which the stone was found was more valuable for other uses than its mineral capabilities.

The validity examination concluded as follows:

> CONCLUSIONS
> The investigation concludes that the mineral material from the Greenstone No. 1 Mining Claim fails to satisfactorily affirm four out of the required five classification critieria necessary for the subject stone to be classed as a locatable material subject to disposal under the provisions of the general mining laws of the United States. It is, therefore, the opinion of this minerals examiner that the stone has been improperly located and disposed of, and should in fact be classified as a common variety (saleable) material.
> RECOMMENDATIONS
> It is recommended by this minerals examiner that contest action seeking to declare the Greenstone No. 1 Claim null and void, ab initio, be initiated. The operative charge should be that the material found within the limits of the Greenstone No. 1 Claim is not a valuable mineral deposit under § 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601), hence no discovery has been made.

---

[2]In addition to the single sale of approximately six tons in 1968, the plaintiffs had made two sales subsequent to the filing of their lawsuit against Alyeska. In 1978, they sold about 26 tons at $40 per ton for use in a fireplace in a Fairbanks residence. In 1978, the plaintiffs also placed about 15 tons of their stone on consignment with Fairbanks Sand and Gravel, Inc. About two tons of this stone had been sold prior to the issuance of the validity examination report.

United States Department of the Interior, Bureau of Land Management, *Mineral Report: Validity Examination of the Greenstone #1 Mining Claim*, October 10, 1979 (Appendix E, at 58a)

On April 3, 1980, the Bureau of Land Management filed a contest action against the plaintiffs, alleging that their mining claim was invalid in accordance with the conclusions of the validity examination. (Appendix F)

The motions of Alyeska to supplement the record on appeal with the validity examination report and the contest complaint of the Bureau of Land Management were granted by the Alaska State Supreme Court on February 5, 1980 and May 5, 1980, respectively.

On June 5, 1981, the Alaska Supreme Court issued its decision in this case, affirming the judgment of the court below. With respect to the stay question, the court held that, although this was an action for damages, and although the superior court had specifically ruled that the plaintiffs must prove that they had a valid mining claim before they could recover, the lawsuit was a "possessory action" under the provisions of 30 U.S.C. § 53, and that the state court had jurisdiction to determine the validity of the claim for the purposes of the lawsuit. The court rejected Alyeska's argument that the Bureau of Land Management had primary jurisdiction to determine the validity of the claim, and held that the failure to grant a stay was proper. (Slip Op., Appendix B, at 23a) The court also ruled that the instruction given the jury regarding the date of determining marketability had been adequate, even though the instructions did not mention the marketability date question. (*Id.*, Appendix B, at 15a) On July 14, 1981, the Alaska Supreme Court denied Alyeska's motion for reconsideration of its decision. (Appendix A.) A stay of execution on the judgment pending application to this court for a writ of certiorari was granted by the superior court judge on August 14, 1981.

Subsequent to the granting of the stay in this case, Alyeska learned that the parties to the contest action were considering a request that the action be dismissed. On September 2, 1981,

Alyeska accordingly filed a protest to any dismissal of the contest action. On September 4, 1981, by letter to the Secretary of the Interior, Alyeska requested that the Secretary assume jurisdiction over the contest. Unknown to Alyeska, the administrative law judge had filed an order dismissing the proceedings on August 20, 1981, pursuant to a stipulation for dismissal by the parties. Upon learning of the order dismissing the action, Alyeska also filed a motion to intervene in the contest action and filed a notice of appeal of the dismissal order. These actions are pending at the present time.

In a memorandum of understanding accompanying the stipulation for dismissal, Anderson and Thomas agreed to relinquish all right, title and interest in the Greenstone #1 mining claim in return for a promise by the United States that it would not "contest the validity of the said mining claim with respect to Whitten H. Anderson and Ronald R. Thomas during the period of time which they held the claim." The United States did not agree to not pursue a damages action against the Petitioner, Alyeska. Although the question before this Court remains the same — whether the state court should have stayed proceedings pending the outcome of the federal administrative review — respondents thus appear to have made a tactical decision to waive their right to prove the validity of their claim before the Department of the Interior if the state action is reversed in this Court.

On September 11, 1981, Alyeska filed an action in the United States District Court for the District of Alaska interpleading the United States government and the plaintiffs in the state court action as defendants and placing with the district court a bond in the amount of the judgment owing in the state court action. The interpleader action in the district court was filed to forestall the possibility of Alyeska being held liable to both the plaintiffs in the state action and the United States government should the United States government decide to allege an interest in the gravel taken from the mining claim. This action is also pending in the United States District Court.

REASONS FOR GRANTING THE WRIT

I. The Trial Court was Required to Stay the Damages Action Until the Validity of the Plaintiffs' Mining Claim Under the Laws of the United States had been Determined by the Department of the Interior.

In refusing to grant the stay in this action for damages, the Alaska courts failed to give proper recognition to the jurisdiction of the Department of the Interior. Alyeska was thus forced to litigate in the state court a question reserved by Congress to a special administrative tribunal specifically given power and expertise to decide such questions. Both the superior court and the Alaska Supreme Court refused to grant the stay based on an application of 30 U.S.C. § 53 to the case. Both courts held that a determination of the validity of the respondents' mining claims was not exclusively within the province of the Department of the Interior, reasoning, in part, that the long delay prior to final determination by an administrative proceeding justified the state court's action. (Slip Opin., Appendix B, at 20a) In so holding, the courts misread 30 U.S.C. § 53. That statute does not allow state courts to adjudicate the validity of a mining claim in an action in which the sole relief requested is damages while action is being concurrently taken by a federal administrative agency.

The precedent set by this action seriously undermines the federal administrative structure for reviewing mining claims. Respondents have never proved and, now that they have relinquished all interest in Greenstone #1, never will have to prove that their mining claim is valid before the special tribunal designated by the Congress to determine such matters. There is no reason for them to do so. Respondents have their judgement: they no longer need care whether their now-abandoned mining claim was ever valid. In practical effect, the reasoning of the Alaska courts thus removes an entire category of cases from the jurisdiction of the Department of the Interior. The rationale that no stay should issue because of the delay involved in pursuing an administrative remedy applies equally to any claim that might be brought before the Department of the Interior. Plaintiffs with damages claims may thus bring their ac-

tions in state court and adjudicate the validity of their claim in that forum, instead of before the Department as the Congress intended. Where, as here, the plaintiffs prevail, the validity question will, for practical purposes, have been determined in the state court alone.

The Alaska court's ruling has a second unfavorable affect. Respondents now have a $1.9 million judgment against Petitioner which has become final in the state court. The state court determination is not binding on the United States. *Perego v. Dodge*, 163 U.S. 160, 168, 16 S.Ct. 971, 974, 41 L. Ed. 113, 118 (1896). Nothing prevents the United States from reasserting a second claim against Alyeska based on *its* ownership of the mining claim. Petitioner is thus in jeopardy of having to pay damages twice to two different parties for the same acts. The Alaska courts' interpretation of the stay question leads, as it has in this case, to waste of judicial and administrative resources, inconsistent decisions on the same body of facts, and injustice in the form of potential double liability.

Alyeska was not in possession of the Greenstone No. 1 claim during the litigation, nor did it ever assert a right to such possession. Respondents were not suffering ongoing or increasing damages when they brought their lawsuit. The sole question before the court was whether the plaintiffs were entitled to damages for previous acts, a question which necessarily involved a determination of the validity of the plaintiffs' claims under federal law. In ruling that 30 U.S.C. § 53 gave the court jurisdiction to hear the case during the pendency of a federal administrative review of the claim's validity, the superior court extended the statute beyond its intended bounds. The proper course of action, indeed the only course of action open to the court, was to defer a decision on the damages claim until after the Bureau of Land Management, the special administrative body set up to determine validity questions, had made a decision on the plaintiffs' claim. An immediate decision was not necessary to protect the Respondents from further injury.

30 U.S.C. § 53 must be considered an exception to the generally exclusive jurisidiction given to the Bureau of Land

Management over mining claim questions. If the action proposed to be brought in state court does not fall within the circle of cases covered by that statute, it must be deferred to the administrative body for a decision. *See Ryan v. Pitkin Iron Corp.* 444 F.2d 717, 718-19 (10th Cir. 1971); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336-37, 83 S.Ct. 379, 382-83, 9 L. Ed. 2d 350, 353 (1963).

> [C]ourts that try issues sometimes wait until the administrative agency that has special competence in the field has ruled on them. The controversy within the Court over the appropriateness of that procedure in given situations is well known, though there is no dispute over the soundness of the Abilene doctrine, adumbrated by Chief Justice White in *Texas & Pacific Rail Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553. It is difficult to imagine a more appropriate case for invocation of the jurisdiction of an administrative agency for determination of one of the issues involved in a judicial proceeding . . .
>
> Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected. The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector.

Id. 371 U.S. at 338-39, 83 S.Ct. at 383-84, 9 L. Ed. 2d at 354-55; *Cameron v. United States*, 252 U.S. 450, 459-60, 40 S.Ct. 410, 412, 64 L. Ed. 659, 662 (1920).

The legislative history of 30 U.S.C. § 53 demonstrates conclusively that the statute was for the purpose of giving mining prospectors an immediate forum to hear complaints based on the right to possession. The statute was passed as part of the Act of February 27, 1865, Ch. 64, 13 Stat. 441, setting up the Nevada federal court system. The purpose of the statute was to protect in federal courts what had been a common custom in territorial courts: the right to litigate ejectment actions in

the territorial courts, without proving paramount title. *Gillis v. Downey*, 85 F. 485, 486 (8th Cir. 1898). The legislation was enacted to allay fears that cases in the United States Supreme Court which require proof of paramount title to land before a plaintiff can maintain an ejectment action would be applied to mining claimants, thus depriving them of a remedy against claim jumpers. The Senate debate on the amendment which became 30 U.S.C. § 53 makes clear that the purpose of the amendment was to provide a forum for ejectment actions without requiring a plaintiff to prove paramount title:

> Mr. DAVIS. I will ask the honorable Senator from Vermont this question: suppose a miner has been in possession five years, and a wrong-doer or a number of wrong-doers go and turn him out with the strong hand, and are in possession themselves, what remedy has that miner?
>
> Mr. COLLAMER. He can bring his action of ejectment to the court.
>
> Mr. DAVIS. Why, he is a trespasser.
>
> Mr. COLLAMER. That is immaterial. I apprehend that prior occupancy is always sufficient against a trespasser.
>
> Mr. DAVIS. But both were trespassers.
>
> Mr. COWAN. An outstanding title from the United States would be a good defense.
>
> Mr. STEWART. It would be a good defense in the Supreme Court of the United States, but we have not allowed it to be set up. We rely on the prior possession always. We give the title to the prior occupant. I will read a passage from the decision of the Supreme Court in the case of *Burgess v. Gray*, 16 Howard, page 65:
>
> > And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it; and more especially he cannot maintain it against persons holding possession under title derived from proper officers of the Government. He

> must first show a right in himself before he can call into question the validity of theirs.

I do not believe a case can be found where a party has been allowed to recover on prior possession alone in the Supreme Court of the United States. The rule in ejectment is that the plaintiff must recover on the strength of his own title.

Congressional Globe, 38th Congress, 2d Session 949 (February 22, 1865)

. . . .

Mr. JOHNSON. I offer the amendment which I have read, as I understand I can do, as a substitute for the amendment offered by the Senator from Nevada. I say to that Senator and to the Senate that in my opinion it will cover the case for which he desires to provide. I understand that his difficulty is that the possession in mining privileges is not protected by suit because the courts here hold that the paramount title is in the United States, and no title except a title acquired under the United States by patent can be protected. This amendment says that in no such case shall the fact that the paramount title to the land in which the mines are is in the United States have any influence.

. . . .

Mr. STEWART. I call for the reading of the amendment of the Senator from Maryland again.

The Secretary read, as follows:

> And be it further enacted, That no possessory action in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are is in the United States.

. . . .

Mr. DAVIS. I suggest to the Senator from Maryland that he add these words, or something equivalent to them, "but each case shall be adjudged upon the law of possession."

> Mr. JOHNSON. I have no objection to that. I understand that to be the effect now.

Congressional Globe, 38th Congress, 2d Session 952, 953 (February 22, 1865). *See Gillis v. Downey*, 85 F. 485, 486 (8th Cir. 1898).

The need for this legislation existed because of the lack of an overall mining law at the time the legislation was passed. In 1872, a comprehensive mining law was enacted, and the Department of the Interior became the special tribunal specifically given the responsibility to make determinations as to the validity of mining claims on federal land. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336, 83 S.Ct. 379, 383, 9 L. Ed. 2d 350, 353 (1963); *Cameron v. United States*, 252 U.S. 450, 460, 40 S.Ct., 410, 412, 64 L. Ed. 659, 662 (1948). Section 53 remained on the books to allow private litigants to litigate possessory actions--it was *not* intended to allow circumvention of the special tribunal set up by Congress to make validity determinations. *Potter v. Randolph*, 58 P. 905, 906 (Cal. 1899); *see Astiazaran v. Santa Rita Land and Min. Co.*, 148 U.S. 80, 83, 13 S.Ct. 457, 458, 37 L. Ed. 376, 377 (1893).

In refusing to grant the stay in this matter, the Alaska courts failed to pay proper respect to the primary jurisdiction of the Bureau of Land Management with respect to mining claims. The statutory structure established by Congress places the responsibility for enforcement of federal mining laws on the Bureau of Land Management. That agency has developed and applied the tests upon which the validity of a federal mining claim is judged. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 337-38, 83 S.Ct. 379, 382-83, 9 L. Ed. 2d 350, 353-54 (1963).

> The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75, 72 S.Ct. 492, 494, 96 L. Ed. 576, 582 (1952). *See, United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64-65, 77 S.Ct. 161, 165, 1 L. Ed. 2d 126, 132 (1956); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433, 60 S.Ct. 325, 331, 84 L. Ed. 361, 370 (1940). In other contexts, the Alaska Supreme Court has recognized that this rule requires the staying of state court actions pending federal administrative proceedings. *Heffle, et al. v. State of Alaska*, Opin. No. 2416 at 4 (Alaska Sept. 15, 1981).[3] In this case the court refused to apply the rule.

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[3]In *Heffle*, a decision published by the Alaska Supreme Court barely three months after the decision in this case, one of the defendants, a native Alaskan, claimed he was entitled to lands located on a portion of the right of way for the Trans-Alaska Pipeline by virtue of an application made for a native allotment under the Alaska Native Allotment Act of 1906, Chapter 2469, 34 Stat. 197. The defendants placed a road block across the pipeline access road adjacent to the pipeline and charged tolls. The state superior court granted the state's application for an injunction. The supreme court reversed, holding that since the question of the validity of a Native Allotment Claim had been referred by Congress to a federal administrative agency, the Bureau of Indian Affairs, the state court had no jurisdiction to enter an injunction in the case. *Heffle, et al. v. State of Alaska*, Opin. No. 2416, at 4 (Alaska, September 15, 1981).

The purpose of the primary jurisdiction doctrine is to prevent the twin evils of inconsistent adjudications on the same set of facts, and adjudications based on lack of expertise or specialized knowledge in a particular area. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L. Ed. 2d 126, 132 (1956). Both difficulties arise in this case. Because the verdict in the state court is not binding on the federal government, Alyeska faces double liability if the administrative body makes a different determination. Moreover, as will be discussed in the next section of this petition, even the Supreme Court of the State of Alaska found that the superior court had not given instructions which properly defined the tests under federal law for a valid mining claim. These problems could have been avoided if the superior court had taken the proper step when requested and stayed the trial pending federal administrative action.

II. The Jury Instructions Deprived Alyeska of its Right to a Correct Statement of Federal Mining Law Because they Did not Specify that a Mineral Must be Marketable on the Date of the Alleged Discovery.

There is no question that this case turned on the proper application of federal mining law to the facts. The superior court specifically ruled that the respondents must prove they had established a valid mining claim under federal law in order to recover. (Transcript, Appendix D, at 41a) The respondents proceeded on that theory. The Alaska Supreme Court affirmed on the principle that federal mining law applied. (Slip Opin., Appendix B, at 6a)

State courts, when applying federal law, have an obligation to articulate that law correctly.

> The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, in-

> tended to make not less, but more secure. . . . So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under section 237(b) of the Judicial Code, 28 U.S.C. § 344(b), 28 U.S.C.A. § 344(b).

Garrett v. Moore-McCormack Co., 317 U.S. 239, 245-46, 63 S.Ct. 246, 251, 87 L.Ed. 239, 243-44 (1942).

On appeal, Alyeska complained of several inadequacies in the jury instructions given by the superior court regarding federal mining law. The first of these related to the marketability of minerals on the date of discovery. Respondents had presented substantial evidence regarding the amount of rock which might be sold in the future in the decorative building stone market in Fairbanks. For example, Anderson testified with respect to a method of extraction by which he believed he could deliver approximately 175 tons of rock in one day at a cost of approximately $16 per ton. He had used this method only once before on a small quantity of rock, and had experienced a 50% breakage of the rock delivered. Assuming a 50% breakage rate, the true extraction cost was $30-32 per ton. Anderson's speculative testimony about future extraction costs was made even more questionable by the fact that the costs could be achieved only by extracting 175 tons of rock in bulk on one day; up to the date of trial, the respondents had sold a total of approximately 34 tons of rock over a 13-year period. There was also a substantial speculation on the part of the respondents as to the total percentage of the decorative building stone market that their rock might capture in the future, if marketing efforts were made. All this testimony dealt with marketability in the future.[4]

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[4]The speculative nature of the Respondents' evidence of value and future marketability is further illustrated by the fact that they no longer even assert ownership of the mining claim, now that their judgment in state court has become final.

Alyeska objected to the failure of the superior court to give a requested instruction (Appendix H) to the jury that materials from the mining claim must be marketable as of the date of discovery, not at some date in the future (Transcript, Appendix D, at 41a-43a) *Hallenbeck v. Kleppe*, 590 F.2d 852, 859 (10th Cir. 1979). The Alaska Supreme Court agreed that Alyeska's proposed instruction properly stated the law in this respect, but considered the superior court's instruction adequate. (Slip Opin. Appendix B, at 15a) The instruction by the superior court, however, said nothing regarding the date of discovery. Given the extensive speculative evidence presented by the respondents on future marketability, the superior court deprived Alyeska of an adequate instruction on federal law by the failure to give an instruction requiring marketability as of the date of discovery.[5]

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[5]Alyeska also requested an instruction on a related point. It asked that the jury be instructed that a lack of sales history tends to negate a finding of marketability. On appeal, the Alaska Supreme Court agreed that such an instruction "would have been helpful," but held that the failure to give it was harmless error. (Slip Opin., Appendix B, at 16a). In its investigation of the validity of the mining claim, the Bureau of Land Management concluded that the stone was not marketable.

> On the basis of three sales totalling less than thirty-four tons over about a 13-year period, (see Criteria Discussion (3)), the claimants have realized a net profit (after all expenses) of between Forty Dollars to Fifty Dollars per ton from slate extracted from the Greenstone No. 1. Shaw Creek and Fox Building Stone, the leaders (tons/years marketed) in the local decorative stone market, average approximately Thirty Dollars to Forty Dollars per ton net profit based on numerous sales totalling in excess of seventy-five to one hundred tons per year. The current estimate of the total building stone annually marketed in the Fairbanks area is about four hundred tons.
>
> It is therefore the opinion of this minerals examiner that the above contention, based on the claimant's net profit, albeit higher, does not constitute a finding of economic or marketability advantage over competitive stone in the marketing area. This criterion is thus considered deficient.

United States Department of the Interior, Bureau of Land Management, *Mineral Report: Validity Examination of the Greenstone No. 1 Mining Claim*, October 10, 1979. (Appendix E at 56a) (Footnotes omitted).

CONCLUSION

The failure to grant a stay in this case was a misapplication of 30 U.S.C. §53 which has substantially prejudiced Alyeska's rights under federal law, and left it potentially liable to pay the same judgment to two different parties. This was an action for damages only, and no challenge to the right of the respondents to possession of the mining claim was being made. The Bureau of Land Management had begun an investigation into the validity of the claim. The lawsuit thus did not fall within the narrowly delineated confines of 30 U.S.C. §53. Since it did not, the Alaska courts did not have jurisdiction to entertain an action in which determination of the validity of the respondents' mining claim was the central issue without first referring that issue to the proper federal administrative body. Having determined to allow a state jury to determine questions of federal mining law, it was incumbent upon the state court to give proper and complete jury instructions regarding that law. This it did not do. For these reasons, the order of the Supreme Court of the State of Alaska, affirming the judgment in the superior court below, should be reversed.

Respectfully submitted,

RICHARD A. HELM
(Counsel of Record)
CHARLES P. FLYNN
NELSON G. PAGE
Burr, Pease & Kurtz
Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ALASKA

ALYESKA PIPELINE SERVICE COMPANY, *Appellant and Cross-Appellee,*	)	Supreme Court Nos. 4536/4539
v.	)	ORDER
WHITTEN H. ANDERSON and RONALD R. THOMAS, *Appellees and Cross-Appellants.*	)	

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Compton, Justice, not participating]

On consideration of the petition for rehearing filed June 16, 1981,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on July 14, 1981.

Filed and Entered 7-14-81
APPELLATE COURTS of
the STATE of ALASKA

CLERK OF THE
SUPREME COURT

Robert D. Bacon CLERK

By _____ Deputy

_____
ROBERT D. BACON

ccs: Justices
Counsel

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

ALYESKA PIPELINE SERVICE COMPANY, *Appellant and Cross-Appellee,*	)	File No. 4536, 4539
v.	)	OPINION
WHITTEN H. ANDERSON and RONALD R. THOMAS, *Appellees and Cross-Appellants.*	)	[No. 2364 - June 5, 1981]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks,
Jay Hodges, Judge

Appearances: Charles P. Flynn and Nelson G. Page, Burr, Pease & Kurtz, Inc., Anchorage, for Appellant. Charles D. Silvey, Merdes, Schaible, Staley & DeLisio, Inc., Fairbanks, and Clyde Martz and Howard L. Boigon, Davis, Graham & Stubbs, Denver, for Appellees.

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice. [Compton, Justice, not participating.]

RABINOWITZ, Chief Justice.
MATTHEWS, Justice, dissenting.

This appeal is from a jury award for the unlawful taking of slate from the mining claim of Anderson and Thomas (hereinafter Anderson) by Alyeska during the construction of the Trans-Alaska Pipeline System. Alyeska asserts numerous specifications of error concerning the validity of Anderson's mining claim and the propriety of the damages awarded. Anderson cross-appeals from the court's failure to award pre-judgment interest, the court's award of attorney's fees, and the court's directed verdict in favor of Alyeska on the issue of punitive damages. We conclude that none of the specifications of error in either the appeal or the cross-appeal have merit and thus affirm the judgment of the superior court.

In 1966, Anderson filed an unpatented mining claim at Mile 34.5 Elliot Highway, just north of Fairbanks. His mining claim is for building stone (green slate) alleged to possess distinct and special value. Anderson testified that the physical qualities which give this stone distinct and special value are its easy cleavability, distinctive streaks which permeate the stone, and the presence of fossils.

In 1975, one of Alyeska's subcontractors constructed a pipeline access road across Anderson's mining claim. Anderson discovered this and negotiated a lease for an access road right-of-way at an annual rental of $1,000. The lease contained a covenant against waste.

In 1976, employees of Price, a joint venture subcontractor for Alyeska, removed a quantity of rock for use in the pipeline construction. Wemmer, foreman of the crew that removed the slate, testified that he knew when he was removing the slate that it was not from one of Alyeska's designated materials locations. The designated location in that area was on a steep incline which was difficult to reach; attempts to use it had resulted in serious damage to several trucks. The slate deposit was easily accessible and was well-suited for use as material to support the pipeline structure. Wemmer testified that his supervisor had talked to a representative of the State Department of Highways who was also taking rock from this area and that the state representative had given authorization for taking the rock. Wemmer further testified that Alyeska's sub-

contractors had previously taken material from state rock sites after obtaining permission from the state. After Wemmer was informed by his supervisors that this rock should not have been taken, he proceeded to remove an additional six truck loads of rock.

Anderson requested payment for the taking of the rock and subsequently filed suit, alleging claims for relief sounding in both tort and contract, for conversion of the rock. The primary disputes at trial centered on two areas. Alyeska contested the validity of Anderson's mining claim, contending that the claim did not encompass a "valuable mineral deposit" as required by 30 U.S.C.A. § 22; Alyeska argued that absent a valid mining claim, Anderson had no right to damages on either a tort or a contract rationale. The other primary area of contention was the extent of damages incurred, namely the quantity and value of the rock which was removed by Alyeska from Anderson's claim. By special verdict, the jury found that Anderson had "discovered a valuable mineral as defined in the instructions" and awarded Anderson compensatory damages in the amount of $1,911,429.40.

In this appeal Alyeska contends that the superior court's instructions pertaining to the issue of whether Anderson had located a valuable mineral deposit under federal law were inadequate and confusing; that the superior court should have granted its motions for summary judgment, directed verdict, and judgment n.o.v. on the theory that Anderson had failed to establish that he had a valid mining claim; that the trial should have been stayed pending determination by the Bureau of Land Management of the validity of Anderson's mining claim; and that the superior court's instructions allowing a harsh form of trespass-conversion damages were improper. As noted previously, Anderson has cross-appealed, claiming that the superior court should have awarded prejudgment interest and greater attorney fees, and that it erred in directing a verdict in Alyeska's favor on the issue of punitive damages.

I. Instructions Concerning the Validity of Anderson's Mining Claim.

To recover for the removal of the rock, Anderson was required to establish that he had a valid claim to it. Anderson's interest in the subject rock was based on his unpatented mining claim located on federal land. Alyeska, in an attempt to defeat his claim for damages, asserted that Anderson did not establish a valid mining claim.

To be valid under the provisions of 30 U.S.C.A. § 22, a mining claim must be one for "valuable mineral deposits."[1] Two complementary tests have been developed for determination of whether minerals are valuable: the prudent person test and the marketability test. *See United States v. Coleman*, 390 U.S. 599, 601-603, 20 L. Ed. 2d 170, 174-75 (1968). These tests

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[1]30 U.S.C.A. § 22 (West 1971) provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The Supreme Court, in United States v. Coleman, 390 U.S. 599, 600 n.1, 20 L. Ed. 2d 170, 173 n.1 (1968), noted:

> The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat 91, 30 U.S.C. § 22, which provides in § 1 that citizens may enter and explore the public domain and, if they find 'valuable mineral deposits,' may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is 'charged with seeing . . . that valid claims . . . [are] recognized, invalid ones eliminated, and the rights of the public preserved.' Cameron v. United States, 252 U.S. 450, 460, 64 L. Ed. 659, 662, 40 S.Ct. 410.

For the law of discovery, *see generally* Reeves, *The Law of Discovery Since Coleman*, 21 Rocky Mtn. Mineral Law Inst. 415 (1976); Reeves, *The Origin and Development of the Rules of Discovery*, 8 Land & Water L. Rev. 1 (1973).

"are not distinct standards but are complementary in that the latter is a refinement of the former."[2] *Id.* at 603, 20 L. Ed. 2d at 175. Basically, the prudent person test requires that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine."[3] The marketability test requires that "it must be shown that the mineral can be 'extracted, removed and marketed at a profit.' "[4]

In addition to the foregoing, since the only claimed use for the slate found in Anderson's claim is as building stone, it also comes under the Common Varieties Act, 30 U.S.C.A. § 611 (West 1971).[5] This act provides that:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereinafter located under such mining laws: *Provided, however,* That

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[2]For problems involved in applying these two tests with one viewed merely as a refinement of the other, *see* 1 American Law of Mining § 4.82 (1980); Reeves, *The Law of Discovery Since Coleman,* 21 Rocky Mtn. Mineral Law Inst. 415, 438-41 (1976).

[3]United States v. Coleman 390 U.S. 599, 602, 20 L. Ed. 2d 170, 174 (1968) (citation omitted).

[4]United States v. Coleman, 390 U.S. 599, 600, 20 L. Ed. 2d 170, 173 (1968) (citation omitted). *See generally* Lacy, *Present Marketability: A Proper Test of Mineral Value Under the Mining Law?,* 9 Ariz. L. Rev. 70 (1967).

[5]On appeal, Anderson contends for the first time that slate is not a common building material and thus that the Common Varieties Act is inapplicable. Given our affirmance of the finding that the material in issue had "distinct and special value," we need not address this contention.

> nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in sections 601, 603, and 611 to 615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value . . . (emphasis in original)[6]

The Supreme Court, in *United States v. Coleman*, 390 U.S. 599, 605, 20 L. Ed. 2d 170, 176 (1968), determined from the legislative history of 30 U.S.C.A. § 611 that building stone was intended to be included within this section:

> [W]e read 30 U.S.C. § 611, passed in 1955, as removing from the coverage of the mining laws 'common varieties' of building stone, but leaving 30 U.S.C. § 161, the 1892 Act, entirely effective as to building stone that has 'some property giving it distinct and special value'.

Thus besides satisfying the marketability and prudent person

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[6]43 C.F.R. § 3711.1(b) (1979), implementing 30 U.S.C.A. § 611, provides:

> (b) 'Common varieties' includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties.' This subsection does not relieve a claimant from any requirements of the mining laws.

tests, Anderson had the further burden of proving that the slate located in his claim had "distinct and special value."[7]

Regarding these tests, the superior court instructed that:

> Federal lands, unless otherwise appropriated, are open for entry and location of mining claims only as to valuable mineral deposits. The term 'valuable mineral deposits' has a special meaning with respect to the type of material

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[7]The question of whether a material possessed distinct and special value was considered in some detail in United States v. U.S. Minerals Development Corp., 75 Interior Dec. 127 (1968). In *U.S. Minerals*, the stone in question was a reddish quartzite used for veneer on walls and for fireplaces and patio floors. That decision sets forth the relevant test in this area as interpreted by the Department of the Interior:

> In short, the Department interprets the 1955 act as requiring uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.
>
> **The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.**
>
> . . . .
>
> **When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining**

involved in this law suit. In order for the material involved in this law suit to be classified as a 'valuable mineral deposit' it must have a distinct and special value.

In our view this instruction adequately described the relevant portion of 30 U.S.C.A. § 22.[8] The instruction also expressed the superior court's recognition that slate is a "common variety" mineral and that thus it must possess a "distinct or special value" to be the basis of a valid mining claim.

The superior court further instructed that:

In demonstrating that the type of material involved in this law suit has some special and distinct economic value, the plaintiff must show either (1) a unique quality which permits a use for the mineral for which other

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whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold.

With these principles in mind we turn to a consideration of the facts in this case. The special properties claimed for the Rosado stone are its reddish color and luster and its easy cleavability. The stone is a quartzite, i.e., a metamorphosed sandstone. The evidence indicates that the nearest similar deposit of quartzite is 14 or 15 miles away, although one of appellant's officers testified that it was not of the same quality. As noted earlier, the stone has been sold and used in a variety of building construction, as veneer in walls, in fireplaces and hearths, and in patio floors. Two stone masons testified for the appellant that people like the color of the Rosado stone and that it was good to work with. However, it was not used for any purpose that other decorative building stone is not used for.

Since no unique use is claimed for the stone and it is used only for the same purposes as any decorative building stone, the question is whether the special properties of the stone, color and cleavability, give it a special and distinct value for such uses. That is, does it command a higher price than other decorative building stone in the area?

Id. at 134-35 (citations omitted).

The *U.S. Mineral* position was accepted in McClarty v. Secretary of the Interior, 408 F. 2d 907, 908-09 (9th Cir. 1969), with the qualification that value could be shown not only by a higher price but also by increased profits for a competitive price.

[8] *See* note 1 *supra*.

> materials may not be used; or (2) if uses are the same, that some unique quality gives the mineral an economic advantage over competing stone, reflected either in higher price for the stone in question, or alternatively, in lower production costs. That is, the alleged unique quality must result in an economic advantage. In applying the foregoing standards, the inquiry is not limited to deposits of identical stone. Rather inquiry is made to the availability and price of competing materials used for the same purposes.

This instruction correctly defines the term "distinct and special value." Further, the court gave the following instruction:

> In determining whether a deposit constitutes a valuable mineral deposit, two basic tests are utilized. First, there is the marketability test, which requires that a mineral be shown to be marketable at a profit, and moreover, marketable at a profit comparable to that obtained by persons marketing competing materials. Secondly, there is a more generalized 'prudent-man test': that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Factors relevant to the foregoing considerations include (1) availability of other sources of material to meet market demand; (2) proximity of the material in question to market; (3) quality and quantity of the deposit; (4) accessibility of the deposit; (5) price and cost factors; and (6) actual utilization of the deposit.

We believe this instruction fairly summarized the prudent man and marketability tests.

It is to these three instructions that Alyeska took exception on the grounds that they were incomplete and misleading. The claim that the instructions were misleading is based on the contention that the instructions failed to make clear that the "distinct and special value" test was separate from the marketability and prudent person tests. Alyeska further

argues that these instructions gave the jury the impression that it was necessary to satisfy only one general test, rather than several distinct tests. Alyeska made appropriate objections before the superior court and requested that its proposed instruction no. 3, describing the marketability and prudent person tests, be given instead of the instruction quoted above. Alyeska's proposed instruction was virtually identical to the one given by the superior court except for the addition of a prefatory sentence which reads: "In addition to a demonstration of economic advantage over competing stone, plaintiffs bear the burden of meeting two further basic tests."

We are of the view that the court's three instructions adequately informed the jury of the fact that the tests were separate. Considering the circumstances under which the instructions were given and their probable effect on the jury, we are convinced that failure to give this additional clarifying sentence did not result in jury confusion and, thus, it did not affect Alyeska's substantial rights.[9]

Alyeska's other assertion of error concerning these instructions is that they were inadequate. It is claimed that the superior court's instructions failed to set forth relevant factors pertaining to the "distinct and special value" test and to make clear that certain other factors were to be excluded.

The first half of Alyeska's proposed instruction states that a finding of uniqueness must be based on factors beyond the fact that the material commands a higher price, or is subject to

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[9]Alaska R. Civ. P. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See also Martinez v. Bullock, 535 P.2d 1200, 1206 (Alaska 1975).

lower production costs, than competing decorative stone.[10] According to Alyeska, the existence of abundant nearby deposits of identical stone without distinguishing features would negate uniqueness. In *United States v. Heden*, 19 IBLA 326, 339 (1975), it was held that "in comparison with the extremely large deposits of similar stone throughout the area, the stone herein concerned is not unique." Although the legal basis for Alyeska's proposed instruction is undeniable, there was not a sufficient factual basis to support the giving of the instruction in this case. No testimony was given that reflected that green slate was actually available anywhere else in the Fairbanks area for use as a building stone or that any had been placed on the Fairbanks building stone market. Thus, we find no error in the superior court's failure to give this portion of Alyeska's proposed instruction.

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[10]Alyeska's proposed instruction no. 2 read:

If you find that the material does not command a price higher than or production costs lower than that for competing decorative building stone, you must then consider other factors in determining whether the stone may be said to b sufficiently unique to be subject to valid location under federal mining law. In the facts of this case, you must consider whether and to what extent there are deposits of stone similar to the stone involved in the current case in relevant areas of Alaska. That is, if the deposit is but one of several deposits in the area, it cannot be said to be unique within the meaning of federal law. Similarly, the lack of substantial sales of the stone, where a claim has been held for some time, is relevant to the issue of uniqueness. That is, if only limited and sporadic sales have occurred such a factor tends to negate claims that the rock possesses a special and distinct value which was marketable as of the date of discovery. Factors which are not relevant and which should not be considered on the issue of uniqueness include location, accessibility, or proximity of the rock to market. That is, the distinctive qualities referred to in federal law relate to inherent physical characteristics of the material in question, and not to external factors such as proximity to market. Claims of uniqueness may also not be based upon speculation as to future prices or the availability of a market at a future date. That is, marketability of the stone as a result of alleged unique qualities must be established as of the date of the alleged discovery. Locations of mining claims based on speculation that there may at some future date be a market for the discovered materials are not allowed.

The second half of Alyeska's proposed instruction enumerates certain relevant and irrelevant factors regarding the uniqueness test. First, Alyeska asserts that the lack of a history of substantial sales tends to negate uniqueness. The question, as articulated in *U.S. Minerals* and *McClarty*,[11] is whether the subject green slate with its claimed properties of color and cleavability commands a higher price in the market or involves lower production costs than competing stone. Alyeska argues that it is therefore proper to consider anything which reflects on whether the green slate commands a higher price or otherwise offers a profit advantage. We think the jury should have been instructed that it could consider the sales history of this material in relation to the distinct and special value test and that the court erred in failing to so instruct. But, as discussed below, we are of the further view that the court's omission was harmless error.

Alyeska's proposed instruction also would have informed the jury that factors such as location, accessibility, and proximity of the rock to market are irrelevant because "uniqueness" is dependent on the "inherent physical characteristics of the material in question."[12] In determining whether the green slate in issue generates greater profits than other building stone in the Fairbanks area, however, production costs must be considered. Location, accessibility, and proximity to market are relevant to a determination of whether the mineral possesses characteristics that make it more valuable than competing materials.[13] Thus, this portion of the proposed instruction is an incorrect statement of the law and was properly rejected by the superior court.

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[11] *See* note 7 *supra*.

[12] *See, e.g.*, United States v. Heden, 19 IBLA 326, 341 (1975).

[13] 43 C.F.R. § 3711.1(b) (1979) provides in part:

> In the determination of commercial value (for a finding of distinct and special properties of a common variety mineral), such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization (and) accessibility to transportation . . .

Finally, Alyeska's proposed instruction states that determination of the market for the stone must be made on the date of discovery of the mineral rather than at a subsequent time. This is a correct statement of law as to the test of marketability.[14] However, it is not clear that this requirement also applies to the uniqueness test. In any event, because we believe that the superior court's instruction on the marketability test was adequate in this respect, we perceive no need to consider the issue in the context of the uniqueness test. We conclude that the superior court's omission of this portion of Alyeska's instruction was not error.

Thus, the only portion of Alyeska's proposed instruction which should have been given is that which related to the evidence of sales history. The jury was instructed to consider

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[14]In Hallenbeck v. Kleppe, 590 F.2d 852, 859 (10th Cir. 1979), the court held:

> We feel the court correctly followed the test of present marketability. See, *e.g. Coleman*, supra, 390 U.S. at 602-03, 88 S.Ct. 1327; *Barrows v. Hickel*, 447 F.2d 80, 83 (9th Cir.). The court's findings in the instant case stated that: 'A private litigant cannot locate claims upon public lands and then simply wait until the minerals are in sufficient demand to be marketed at a profit,' and also that: '. . . plaintiffs cannot hoard common sand and gravel on public lands until it becomes profitable to market such deposits.' The court also quoted the following statement from the opinion in *Foster v. Seaton*, 106 U.S. App. D.C. 253, 255, 271 F.2d 836, 838:
>
> > To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.
>
> We feel that the district court did not err, and instead properly followed the marketability test. It is required that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence. *Barrows v. Hickel*, 447 F.2d 80, 83 (9th Cir.). The question of marketability is one of fact. The absence of proof of actual sales of material from the claims is relevant but not conclusive and may be overcome by other evidence of marketability. *Melluzzo v. Morton*, 534 F.2d 860, 863 (9th Cir.). The evidence of lack of sales from the claims was relevant and we find no error in the ruling by the district court that the record supports the Board's findings.

the "actual utilization" of the claim and other relevant factors and was fully apprised of the limited sales Anderson had made of the mineral as well as other information relevant to the question of marketability. While an additional instruction further setting forth relevant methods of determining marketability would have been helpful, we cannot conclude that its omission affected substantial rights of Alyeska. We therefore find that any error in the superior court's instructions to the jury was harmless.

II. Superior Court's Refusal to Determine Factual Issues

As its second specification of error Alyeska contends that Anderson presented insufficient evidence to demonstrate a valid mining claim upon which he could maintain claims for relief. Alyeska therefore argues that the superior court should have granted its motions for summary judgment or directed verdict, or ordered a judgment n.o.v. It is abundantly clear that the validity of Anderson's mining claim is an issue of fact and that Alyeska's motion for summary judgment was correctly denied since there existed material issues of fact regarding the validity of the claim. *See Wickwire v. McFadden*, 576 P.2d 986, 987 (Alaska 1978). But a determination of the correctness of the superior court's refusal to direct a verdict or enter a judgment n.o.v. requires that we review the evidence as it relates to the applicable tests we have previously discussed.[15]

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[15]As to the directed verdict, the appropriate standards for review were discussed at length in Teller v. Anchorage Asphalt Paving Co., 545 P.2d 177, 180 (Alaska 1976), *quoting* Holiday Inns of America, Inc. v. Peck, 520 P.2d 87, 92 (Alaska 1974) (footnotes omitted), in which we stated:

> In reviewing a lower court's rulings pertaining to motions for directed verdict we are required to view the evidence in the light most favorable to the non-moving party, and to afford him the benefit of all inferences which the evidence fairly supports. Moreover,
>
> > It is well established that the proper role of this court, on review of motions for directed verdict . . . is not to weigh conflicting evidence or judge the credibility of the

The first question is whether the green slate located in Anderson's claim has distinct and special value, and is thus outside the ambit of the Common Varieties Act. The alleged inherent special qualities of this rock are almost identical to those asserted in *U.S. Minerals.*[16] The question of whether the rock in Anderson's claim is distinct and special therefore turns upon whether it commands a higher price or yields higher profits than other decorative building stone available in the Fairbanks market. The marketability and prudent person tests require, in addition to that determination, that at the time of discovery a prudent person would have been justified in developing the mine and would have had a reasonable prospect of financial success in the venture. The contested factual questions relevant to these tests center on whether there was a market for Anderson's slate.

The record shows that Jack Pruitt, a local stone mason, had used some of Anderson's rock in the construction of a church in Fairbanks prior to the filing of Anderson's claim. The two claim owners, Anderson and Thomas, had also used the stone to build fireplaces for their homes, and Thomas had covered the front of his house with the stone shortly after the claim was filed in 1966. In 1967 or 1968 Anderson sold five or six tons of stone at a price of $80 per ton to the Fox Roadhouse.

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witnesses, but is rather to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is such that reasonable men could not differ in their judgment.

In such cases the appellate court applies an objective test and if there is room for diversity of opinion among reasonable people, then the question is one for the jury to decide. In other words, a jury question, or question of fact, exists whenever it can be said that from the evidence and all reasonable inferences to be drawn therefrom, fair minded people in the exercise of reasonable judgment could reach differing conclusions on the issue in controversy.

The standard is the same for review of a ruling pertaining to a judgment n.o.v. *See* Holiday Inns of America, Inc. v. Peck, 520 P.2d 87, 92 (Alaska 1974).

[16] *See* note 7 *supra.*

This sale resulted in a total profit of approximately $160. Apparently acting without knowledge of Anderson's claim, Warren Stearns, another local stone mason, quarried five tons of rock for his own fireplace during this period. Anderson also placed several tons of stone on consignment with Fairbanks Sand and Gravel. At the time of trial, Fairbanks Sand and Gravel had sold less than two tons of the stone at $85 per ton, for which Anderson received $50 per ton. Additionally, there was a sale made to Wally Burnett in the summer of 1978 of approximately twenty-six tons; Burnett extracted the stone himself and paid Anderson $40 per ton.

As Alyeska repeatedly observes, the only marketing of the slate in the first ten years of Anderson's claim was one sale of five to six tons which resulted in a profit of approximately $160. Alyeska points to this single sale as suggesting that there is no market for the slate. Alyeska also notes that at Fairbanks Sand and Gravel, the only Fairbanks retail outlet for building stone, Anderson's slate sells for $85 per ton while Fox marble sells for $100 to $150 per ton and Shaw Creek rock sells for $120 per ton. Alyeska argues that Anderson's slate does not possess special and distinct features since it is used only for building stone and fails to command a higher price than competing stone.

However, as *McClarty v. Secretary of Interior*, 408 F.2d 907, 909 (9th Cir. 1969), demonstrates, reduced production costs could result in increased profits and could thus qualify the mineral as having a distinct and special value. Here, the evidence taken in the light most favorable to Anderson suggests that he could earn a profit for his stone higher than those earned by competitors. Anderson sold approximately twenty-six tons of rock for $40 per ton to Burnett without incurring any overhead costs. Fairbanks Sand and Gravel was keeping several tons of Anderson slate on consignment, of which they had sold 1.85 tons for $85 per ton. Anderson received $50 per ton from this arrangement and testified that he could bring the stone to market for $15 per ton.[17] Thus, Anderson was

[17]Later, in trying to describe an economical method of hauling his rock in bulk, Anderson testified that he could deliver 174 tons of rock in one day at a cost of $2825. This is equivalent to costs of $16.24 per ton.

capable of making a profit of from $35 to $40 per ton, as compared to the quarry owners' profits of $15 per ton for Fox marble and $25 per ton for Shaw Creek rock. Therefore, we conclude that there was evidence indicating that Anderson had a profit advantage sufficient to warrant a jury's finding that Anderson's slate possessed a distinct and special value. Given this conclusion we hold that the superior court did not err in denying Alyeska's motions for a directed verdict and judgment n.o.v.

Concerning the prudent person and marketability tests, lack of sales constitutes evidence that Anderson's rock was not marketable in 1966. However, as previously noted, it is unnecessary for Anderson to show actual profitable sales, but only that the rock could have been marketed at a profit.[18] A recent Interior Board of Land Appeals decision notes that there may be a variety of acceptable reasons why a marketable mining claim is not being profitably pursued at any given time. *United States v. Williamson*, 45 IBLA 264, 285 (1980). In this case, Anderson testified that his new job had made him unavailable to actively mine the claim and develop a market. Other testimony before the jury suggests a valid finding of marketability. Anderson estimated that his slate could capture one third of the building stone market; a Fairbanks stone mason testified that he thought it could capture one half of the market. An employee of Fairbanks Sand and Gravel, when asked whether Anderson's stone was marketable, stated: "It's marketable. I don't know how much. Time will tell. Our idea is to give people their choice." Jack Pruitt, a local stone mason, testified: "There has not been much of the [slate] marketed . . . [n]ot because it is not a marketable rock . . . It just has not gone over . . ."

We think the foregoing evidence, taking such evidence in the light most favorable to Anderson, warrants the conclusion that reasonable persons could differ as to the outcome of the prudent person and marketability tests. Thus we conclude

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[18] *See* 1 American Law of Mining §§ 4.84 & 4.88 (1980); Reeves, *The Law of Discovery Since Coleman*, 21 Rocky Mtn. Mineral Law Inst. 415, 428 (1976) and cases cited therein.

that the superior court did not err in allowing the jury to make a determination of whether this was a valid mining claim.

III. Refusal to Stay Trial Pending the Department of the Interior's Determination of the Validity of Anderson's Mining Claim.

One month prior to trial Alyeska moved for a stay pending the outcome of an investigation by the Bureau of Land Management of the validity of Anderson's mining claim. This motion, and a subsequent motion to stay this appeal, were denied.

By February 1980 all that had occurred by way of administrative action by the Bureau of Land Management was the issuance of an initial report which recommended that "contest action seeking to declare the Greenstone No. 1 Claim null and void, *ab initio*, be initiated." Alyeska claims that the superior court should have stayed proceedings in this lawsuit until the United States Government and the Secretary of the Interior were able to make a final determination of the validity of Anderson's mineral claim. Alyeska supported its motion only by affidavits which asserted that a validity determination would be forthcoming.

Mindful of the long delay that might be necessary for final adjudication in a federal contest action of Anderson's mining claim[19], we are of the opinion that the issue of a mining claim's validity is not subject exclusively to administrative determination. Of significance here is 30 U.S.C.A. § 53 (West 1971) which provides:

> No possessory action between persons, in any court of the United States, for the recovery of any mining title, or

[19]For an illustration of the time necessary for administrative adjudication, *see* United States v. California Soylaid Products, 5 IBLA 179 (1972). The initial validity examination report in that case was dated December 1963. *Id.* at 182. The contest action was initiated in June 1964 with a hearing held November 1965 and a decision rendered January 1966. *Id.* at 182-83., An appeal was taken from the hearing examiner's decision, and in September 1968 the case was remanded to the hearing examiner. *Id.* at 184. That hearing was held in April 1970. *Id.* at 185. The case again went before the Board of Land Appeals, which rendered its decision in March of 1972. *Id.* at 179.

> for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.[20]

Our reading of the record indicates that the superior court denied Alyeska's motion for a stay on the basis that 30 U.S.C.A. § 53 permitted the maintenance of Anderson's action.

Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906, 9 L. Ed. 2d 716 (1963), dealt with a situation similar to the present one. That case involved a trespass action in which owners of a mining claim alleged a partial ouster as a consequence of the construction of an irrigation district. In its opinion the Ninth Circuit stated:

> We are satisfied from our review of the authorities and the provisions of Section 53, Title 30 U.S.C.A. supra that appellants resorted to the proper forum in instituting their action in the Superior Court of the State of California, in and for the County of Butte, against the irrigation district to recover damages for the alleged trespass of the irrigation district on the possessory interest of appellants in the mining claim. Under the express language of said Section 53 the paramount title of the United States to the land in which such mining claims lies is not affected by such lawsuit, and the rights of the parties to such lawsuit must be adjudged by the law of possession. We recognize that there is a dispute between the parties as to the nature of appellants' possessory interest. In the district court appellants alleged they are owners of a perfected claim, and on motion for summary judgment appellees assert that the claim of appellants was not perfected because of lack of discovery and the non-mineral character of the lands.

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[20]The superior court ruled that a valid mining claim was necessary to Anderson's ability to recover and the trial was based on this ruling. The basis for this action is possession under a valid claim; and the question of paramount title need not be determined. Duguid v. Best, 291 F.2d 235, 239 (9th Cir. 1961) *cert. denied*, 372 U.S. 906, 9 L. Ed. 2d 716 (1963).

In exercising jurisdiction to determine the possessory interests as between appellants and the irrigation district, the state court may be required to determine the mineral or non-mineral character of the land and the question of whether discovery has been made, where such a determination is necessary to settle the controversy before it. We agree with the view of the California courts that it is not improper for state courts to make such a determination but such determination affects only the possessory interests of the litigants and has no effect upon the paramount title of the government.[21] *Id.* at 239 (citations omitted).

One of the grounds advanced by Alyeska in support of its motion for a stay is that "primary jurisdiction" is in the Department of the Interior. The doctrine of primary jurisdiction was discussed in *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.* 517 P.2d 1379, 1382-83 (Alaska 1974) (footnote omitted.) There we said:

> The legal theory which forms the touchstone of appellants' argument is founded on the administrative law doctrine of primary jurisdiction. We are instructed by Professor Davis that the doctrine of primary jurisdiction deals with the question of whether a court or an administrative agency should make the initial decision on a given issue. 3 K. Davis, Administrative Law Treatise § 19.01 at 2 (1958). Its purpose is to help a court decide whether it should refrain from exercising its jurisdiction until after the agency has determined some question or an aspect of some question arising in the proceedings before the court. The operational concept underlying the doctrine is the need for an orderly and reasonable coordination of the work of agencies and courts. Whatever the agency's expertise, opines Davis, the court should not act on a subject peculiarly within the agency's specialized field without first taking into account what the agency

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[21]The cases cited by Alyeska suggesting that a stay was mandated all involve circumstances where the United States was a party to the litigation. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 9 L. Ed. 2d 350 (1963); Wetsel v. Superior Court, 260 P.2d 242 (Cal. App. 1953).

> has to offer. Otherwise, litigants who are subject to the agency's continuous regulation may become victims of uncoordinated and conflicting requirements.
>
> This, of course, is hardly to say that the courts must in each and every case defer to an agency determination. For implicit in the concept of orderly and reasonable coordination is the requirement that the question of deferring to agency expertise be decided with reference to the unique facts of each case.[22]

As Anderson notes, there is no exclusive or primary agency jurisdiction over cases like the present one since Congress has, by virtue of its enactment of 30 U.S.C.A. § 53, granted specific authority to the courts to decide possessory actions involving mining claims. Further, we think it significant that at the time the superior court acted on Alyeska's motion for stay it had no indication as to when a decision on the validity of Anderson's claim would be forthcoming from the Bureau of Land Management.[23] Thus, we conclude that the superior court did not misapply the doctrine of primary jurisdiction and that its refusal to grant a stay was appropriate in the circumstances.[24]

IV. Instruction on the "Harsh" Form of Damages

Alyeska contends that the superior court erred in instructing the jury on a "harsh" form of damages in regard to its alleged conversion of rock from Anderson's claim. Alyeska first asserts that such an instruction is inconsistent with the

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[22] *See also* Greater Anchorage Area Borough v. City of Anchorage, 504 P.2d 1027, 1032-33 (Aiaska 1972), *overruled on other grounds*, City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 629 (Alaska 1979).

[23] *See* note 19 *supra*.

[24] As to issues which deal with the necessity of proof of Anderson's title, Anderson argues that Alyeska is estopped to deny his title because Alyeska leased the land. Estoppel is asserted under a general rule that a tenant is estopped to question the landlord's title. This issue was raised before the superior court, which ruled that the lease was only of the right-of-way and not the entire mining claim. The court's ruling was not appealed and is not before this court.

superior court's grant of a directed verdict against Anderson's claim for punitive damages.[25] The court instructed the jury as to both the harsh and mild rules of trespass-conversion damages. It based its instructions on *Alaska Placer Co. v. Lee*, 553 P.2d 54, 57-58 (Alaska 1976) (footnotes omitted), where we stated:

> When a trespasser removes minerals from the land of another, there are two generally accepted rules of damages: a 'mild' rule for good faith trespassers and a 'harsh' rule for willful trespassers. The mild rule provides that a good faith trespasser must pay the owner damages based either on a royalty rate or on the market value of the minerals less cost of extraction. Thus, the nonwillful trespasser may receive credit for the mining expenses involved in the conversion.
>
> The harsh rule for intentional trespassers operates as a form of punitive damages, with the goal of deterrence. The owner may recover the market value of the converted minerals without offset or deduction for the trespasser's mining costs.

'Good faith,' in the context of trespass on mineral claims, has been defined as an 'honest and reasonable belief' that the taking is rightful; and 'honest intention' not to take 'unconscientious advantage of another.' The United States Supreme Court has stated that good faith in this context is 'something more than the trespasser's assertion of a colorable claim to the converted minerals.' In the instant case, the trial court found

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[25]Specifically, the superior court held:

> The court doesn't feel that the plaintiffs have met the burden with respect to punitive damages . . . [W]hen we talk about intentional, willful, malicious or conduct in reckless disregard of a person's rights -- the Court doesn't feel that reasonable minds could differ with respect to Alyeska. There's no question that -- at least, with Mr. Wemmer and Price that it is, but the Court can't go from them to Alyeska under the law . . .
>
> In any event, the Court is going to grant the motion with respect to the punitive damages, but deny it with respect to the compensatory claim.

that the Lees were good faith trespassers and applied the 'mild' rule of damages.[26]

It is apparent from the superior court's ruling that it concluded that the harsh rule of damages for trespass-conversion cases, while punitive in nature, is distinct from what we normally understand to be punitive damages. One distinguishing feature is the burden of proof appropriate to the two situations. In a determination of the appropriateness of the harsh forms of damages, it is the defendant trespasser who must prove that the trespass was not willful in order to demonstrate that the mild form of damages is applicable.[27] *Alaska Placer Co. v. Lee*, 553 P.2d 54, 58 (Alaska 1976). On the other hand as the superior court stated, the normal rule is that the burden of proof as to punitive damages is upon the party seeking the recovery of the same. D. Dobbs, *Handbook on the Law of Remedies* § 3.9 (1973).

Another distinguishing feature between harsh conversion damages and punitive damages also concerns burden of proof. The quantum of evidence necessary to support punitive damages was set forth in *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *on reh.* 615 P.2d 621 (Alaska 1980). There we stated:

> In *Bridges v. Alaska Housing Authority*, 375 P.2d 696, 702 (Alaska 1962) this court noted that in order to recover punitive or exemplary damages, the plaintiff must prove that the wrongdoer's conduct was 'outrageous, such as

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[26]*See generally* Schwinn, *Tort Liability Resulting From Mining Operations*, 8 Rocky Mtn. Mineral Law Inst. 461, 474-83 (1963); Annot., 21 A.L.R. 2d 380 (1952 & 1980 Supp.).

[27]The jury was instructed:

> The defendant has the burden of establishing by a preponderance of the evidence the following issue:
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> 1. That the defendant had an honest and reasonable belief that the removal, if any, of material from plaintiffs' claim was rightful . . .

See Schwinn, *Tort Liability Resulting From Mining Operations*, 8 Rocky Mtn. Mineral Law Inst. 461, 479-80 (1963).

> acts done with malice or bad motives or a reckless indifference to the interests of another.' Actual malice need not be proved. Rather, '[r]eckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.' Restatement (Second) of Torts, § 908 (Tent. Draft No. 19, 1973).

Thus, in order to go to the jury on the issue of punitive damages, Anderson was obliged to adduce evidence to show that Alyeska's conduct was "outrageous," as defined in *Sturm, Ruger*. The superior court concluded that Anderson did not produce sufficient evidence to permit an instruction on punitive damages.

This is not inconsistent with the court's instruction on the harsh form of conversion-trespass damages. Alyeska had the burden of proving that the trespass was not willful to avoid an instruction on the harsh form of damages. The court determined that Alyeska did not meet this burden of proof. It concluded that reasonable persons could differ as to whether Alyeska had acted in good faith when it removed the rock from Anderson's claim, and a jury question was thus presented on this question of fact. Thus, we find no error in the superior court's instruction concerning the harsh form of trespass-conversion damages.

Alyeska further contends that the superior court's instructions in regard to conversion damages were misleading in that they failed to inform the jury that the harsh rule of damages was in essence a form of punitive damages. Alyeska asserts that the superior court erred in refusing to give its proposed instruction setting forth the elements of state of mind requisite to an award of punitive damages. As we have noted, the elements which must be proven to justify an award of punitive damages are more stringent than those necessary for the imposition of the harsh form of damages in a mining

trespass-conversion action. Thus, we conclude that there was no error in the superior court's rejection of this instruction.[28]

V. Remittitur and Motion for New Trial

Alyeska claims that the award of $1,911,429.40 is punitive and is "so far in excess of any reasonable amount" that the superior court should have ordered a remittitur or a new trial. The standard applicable to review of the superior court's decision on remittitur or new trial was set forth in *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 48 (Alaska 1979) (citation omitted), *on reh.* 615 P.2d 621 (Alaska 1980), as follows:

> We have previously held that the decision to order a remittitur or a new trial rests within the sound discretion of the trial court. We will not interfere with the trial court's decision unless we are 'left with a firm conviction on the whole record that the trial judge made a mistake in refusing to order a remittitur or grant a new trial.' *City of Nome v. Ailak*, 570 P.2d 162, 173 (Alaska 1977) (footnote omitted), and where intervention on our part is necessary to prevent a miscarriage of justice.

Anderson argues that, if the jury applied the harsh rule of damages, the award was well within the range indicated by evidence pertaining to the amount and value of the rock taken from his claim. He also submits that the award would be consistent even with the mild rule of damages. After reviewing the evidence we have concluded that the award was not excessive.

Alyeska argues further that the limited market for decorative stone must be considered in determining whether the damages were excessive and that it would take decades for the local market to absorb the amount of building stone

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[28]Alyeska also asserts that Anderson's knowledge of and failure to prevent the taking of rock from his claim on other occasions constituted a waiver. Waiver is an affirmative defense that must be pled. Alaska R. Civ. P. 8(c). No motion to amend the pleadings was ever made nor was this issue raised as a point on appeal. We therefore do not consider it. *See* Alaska R. App. P. 210(e).

which was taken by Alyeska. Alyeska requested no instruction concerning this view and has cited no cases in support of it. Regardless of the market for building stone, Alyeska needed the stone for pipeline construction and by its tortious conduct created a separate market for the stone in the amount it used. Alyeska did not submit any evidence in mitigation of the damages. Thus, we conclude that the superior court did not err in refusing to order a remittitur or a new trial.[29]

VI. Prejudgment Interest

Anderson, in his cross-appeal, specifies as error the superior court's failure to award prejudgment interest. Anderson moved for an award of prejudgment interest from the date he instituted his action against Alyeska. After extensive briefing, the court denied the motion on the ground that "under the facts and circumstances of this case, an award of prejudgment interest would do an injustice."

In *State v. Phillips*, 470 P.2d 266, 274 (Alaska 1970), in regard to prejudgment interest, we said:

> For a cause of action to accrue, one party must have breached a duty to the other, and the other must have been injured. At the moment the cause of action accrued, the injured party was entitled to be left whole and became immediately entitled to made whole. Whenever any cause of action accrues, therefore, the amount later adjudicated as damages is immediately 'due' in the sense of AS 09.50.280 and AS 45.45.010(a). All damages then, whether liquidated or unliquidated, pecuniary or nonpecuniary, should carry interest from the time the

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[29]Alyeska also asserts that the damages awarded for trespass-conversion were, in essence, for lost profits and as such are too speculative to support the jury's award. *See* State v. Stanley, 506 P.2d 1284, 1294-95 (Alaska 1973). However, in the case at bar fairly ascertainable amounts of minerals were misappropriated. Although the precise tonnage misappropriated is in dispute, the amount and value of the rock removed is far from speculative. Thus, we do not find the award "speculative," and cannot conclude that the superior court abused its discretion in failing to order remittitur or a new trial on this ground.

> case of action accrues, unless for some reason peculiar to an individual case such an award of interest would do an injustice.

This subject was subsequently elaborated on in *Haskins v. Shelden*, 558 P.2d 487, 494-95 (Alaska 1976) (footnotes omitted), where we said:

> Prejudgment interest is in the nature of compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment. It is not meant to be an additional penalty.
> Prejudgment interest is not to be awarded where its award would do an injustice. However, it is only in the most unusual cases that prejudgment interest is not proper. One such unusual case is where the award of such interest would result in a double recovery.

Thus, the question on review is whether this case falls within the narrow class of cases in which an award of prejudgment interest is inappropriate. We conclude that the superior court was correct in its determination that an award of prejudgment interest to Anderson would work an injustice. The jury's award of damages was based on the value of the rock as decorative building stone. The superior court could therefore have reasonably concluded that the jury's award was substantially higher than the amount Alyeska would have paid for the material for use in construction of the pipeline. Since, as Alyeska notes, it would have taken decades for Anderson to market the rock as building stone, it cannot be said that Anderson suffered a loss of income at the time it was wrongfully removed. Because Anderson suffered no loss of income and was adequately compensated for the losses he incurred, the superior court was justified in denying prejudgment interest.

VII. Attorney's Fees

Anderson requested attorney's fees in the amount of $224,000.22, pursuant to Civil Rule 82(a)(1).[30] Alyeska argued that this case was governed by Rule 82(a)(2),[31] which allows the court to award fees "commensurate with the amount and value of legal services rendered" when the amount of the recovery is not an accurate criterion for making the determination. The superior court requested an itemization from Anderson of counsel's time and costs and, after reviewing it, awarded $100,000 in attorney's fees.

The superior court gave the following explanation for its award of attorney's fees:

> Plaintiffs requested attorney's fees as the prevailing party pursuant to Alaska Civil Rule 82 in the sum of Two Hundred Twenty-Four Thousand Dollars and Twenty-two cents ($224,000.22). Plaintiff, pursuant to a request of the Court, filed an itemization of time expended, showing approximately 400 hours spent in connection with

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[30]Alaska R. Civ. P. 82(a)(1) provides:

> Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgement therein, as part of the costs of the action allowed by law:
>
> ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First $2,000	25%	20%	15%
Next $3,000	20%	15%	12.5%
Next $5,000	15%	12.5%	10%
Over $10,000	10%	7.5%	5%

> Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

[31]Alaska R. Civ. P. 82(a)(2) provides:

> In actions where the money judgment is not an accurate criteri[on] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

> this matter. The Court feels that even at $100 per hour for a billing rate, the total attorney's fees on a time basis would only be Forty Thousand ($40,000) Dollars. The Court feels that the formula of Alaska Civil Rule 82 is disproportionate to the actual attorney's fees but in light of the jury verdict, and effort expended, a deviation from the formula of Rule 82 is appropriate and therefore, attorney's fees of One Hundred Thousand ($100,000) Dollars is awarded.

Anderson argues that the superior court erred in determining that a deviation from the Rule 82(a)(1) formula was indicated.

We have required the trial court to state its reasons for making an award of attorney's fees which varies from the schedule in Rule 82(a)(1). *Miller v. McManus*, 558 P.2d 891, 893 (Alaska 1977); *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc.* 555 P.2d 964, 966 (Alaska 1976); *Patrick v. Sedwick*, 413 P.2d 169, 179 (Alaska 1966). Because the superior court did state reasons for its deviation from the Rule 82(a)(1) schedule, our task on review is to determine whether the resulting award was an abuse of discretion. "Abuse of that discretion is established only by a 'manifestly unreasonable' award." *Haskins v. Shelden*, 558 P.2d 487, 495 (Alaska 1976).

Anderson attacks only a portion of the superior court's reasoning, focusing on the statement that "the formula of Alaska Civil Rule 82 is disproportionate to the actual attorney's fees." Counsel has an existing contingent fee arrangement with Anderson that calls for fees of approximately 40% of the difference between the damages awarded by the jury and the costs incurred in pursuing the action. Anderson's counsel, then, stands to earn an attorney's fee of approximately $750,000, and for that reason contends that the superior court erred in holding that the amount provided in Civil Rule 82(a)(1) was disproportionate to the actual attorney's fees incurred.

Considering the reasoning of the superior court in its entirety, we believe that it was the comparison between the Civil Rule 82(a)(1) award and the number of attorney hours spent on

the case that caused the superior court to depart from the schedule. Attorney's fees as requested would have resulted in an award of fees of $560 per hour. The superior court took the position that the money judgment was not an accurate criterion for determining fees in light of the amount of time counsel had devoted to the case and the multi-million dollar recovery. In *State v. Abbott*, 498 P.2d 712, 730-31 (Alaska 1972), we upheld a deviation from the Civil Rule (82)(a)(1) formula where the trial court concluded that that formula produced a figure that was disproportionately large in view of the amount of time counsel had devoted to the case. We adhere to our holding in *Abbott* and find no abuse of discretion in the superior court's deviation from Rule 82(a)(1).

VIII. Punitive Damages

As his final specification of error, Anderson alleges that the superior court erred in granting a directed verdict for Alyeska on his claim for punitive damages. As we have already noted, the superior court concluded that Anderson had not shown Alyeska's actions to be "outrageous," and that punitive damages were therefore inappropriate. *See Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *on reh.* 615 P.2d 621 (Alaska 1980).

We need not reach the question of whether Anderson presented sufficient evidence to reach the jury on the issue of punitive damages. In the particular factual context of this record, we are persuaded that it would have been inappropriate to have allowed the jury the option of awarding both harsh damages for Alyeska's trespass and conversion and punitive damages. Given the general policy that punitive damages are not favored and are to be awarded with caution and within narrow limits,[32] we hold that harsh trespass-conversion damages should be the only form of damages recoverable in the case at bar. Thus, the superior court did not commit error in granting a directed verdict in Alyeska's favor as to punitive damages.

AFFIRMED.

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[32]Alaska Placer Co. v. Lee, 553 P.2d 54, 61 (Alaska 1976).

MATTHEWS, Justice, dissenting.

I disagree with the majority opinion concerning the motion for remittitur or new trial. I would hold that the damages arrived at by the jury were so excessive that the trial judge abused his discretion in denying the motion.

In reviewing the trial court decisions on motions for remittitur or new trial, the appropriate standard of review was articulated in *National Bank of Alaska v. McHugh*, 416 P.2d 239, 244 (Alaska 1966), as follows:

> We have held that the granting or refusing of a request for a new trial is discretionary with the trial judge. We do not interfere in the exercise of that discretion except in the most exceptional circumstances and to prevent a miscarriage of justice. In order for us to hold that the trial judge has abused his discretion, we would have to be left with the definite and firm conviction on the whole record that the judge made a mistake in refusing to order a remittitur or grant a new trial in response to appellant's motion. (footnotes omitted).

A few cases illustrate under what circumstances this court will overturn the trial court's refusal to order a remittitur or grant a new trial. In *City of Nome v. Ailak*, 570 P.2d 162 (Alaska 1977), the appellees brought a civil action in tort against the city and city police officers for false arrest, false imprisonment and trespass. The trial court awarded damages of $10,000.00 for the trespass, $45,000.00 for the false arrest and $45,000.00 for the false imprisonment. After holding that the trespass was privileged and that there was no basis for the $45,000.00 apiece for the false arrest and false imprisonment because they are not separate torts, we ruled that the remaining $45,000.00 awarded to Ailak for false arrest was clearly excessive and without support in the evidence. Noting that there was no evidence of any physical injury to Ailak and only scant evidence of emotional distress, we held that the refusal to order a remittitur of the award of $45,000.00 in compensatory damages for the detention was an abuse of discretion.

Sturm, Ruger & Co., Inc. v. Day, 594 P.2d 38 (Alaska 1979)

was a products liability case in which the buyer of a single-action revolver shot himself in the leg while unloading. Day was awarded compensatory damages of $137,750.00 and punitive damages of $2,895,000.00. Noting that the punitive damage award of $2,895,000.00 was so far out of proportion to the amount of actual damages as to suggest that the jury's award was the result of passion or prejudice, we held that it was a mistake and an abuse of discretion for the trial judge not to have reduced the punitive damages or to have ordered a new trial.[1]

In *Alyeska Pipeline Service v. Aurora Air Service*, 604 P.2d 1090 (Alaska 1979), we directed the superior court to order a remittitur or grant a new trial because the jury had arrived at the damage amount in an improper manner. Aurora alleged that Alyeska had intentionally interfered in its contractual relationship with Radio Corporation of America and submitted evidence of two different figures representing its losses due to termination of the contract. One figure was the specific loss stemming from the cessation of the contract and the other was the loss of projected earnings. The latter figure included the former. When it became evident that the jury had erroneously added together these two figures in arriving at its damage award, we concluded that the superior court had abused its discretion in failing to grant the motion for remittitur or new trial.

Reviewing the record in the present case leaves me with a firm conviction that the trial judge abused his discretion in failing to order a remittitur or grant a new trial. It is clear that the jury either arrived at its damage award in an inappropriate manner or simply ignored the evidence and awarded an excessive amount.

Dissenting Decision's footnotes:

[1]On rehearing, we held that the punitive award was not the result of passion or prejudice, but was simply an excessive verdict and that the award should be reduced to $500,000.00 rather than $250,000.00 as set in the first opinion. Sturm, Ruger & Co., Inc. v. Day, 615 P.2d 621, 624 (Alaska 1980).

The basic principle of damages is that the damaged party should be put in the position in which he would have been but for the tort. Restatement (Second) of Torts § 901, Comment a (1977). Here if Alyeska had never touched the plaintiffs' property, plaintiffs at best could have been selling about 200 tons of rock per year at about $80.00 per ton which would mean that they would gross around $16,000.00 per year. This sum need not be offset for extraction costs under the harsh rule of damages. What sum is necessary to produce $16,000.00 per year forever? It depends on the interest rate of course; 7.5% is certainly fair from the plaintiffs' standpoint. If that rate is used the total award should not exceed $240,000.00. Because this sum is so at variance with the $1,900,000.00 actually awarded I do not think that the award can be allowed to stand.[2]

This result is not inconsistent with *Beaulieu v. Elliott*, 434 P.2d 665, 671-72 (Alaska 1967). There we held that tort recovery for loss of future wages should not be discounted to present value due to (1) the predictable impact of inflation, and (2) the probability of "wage increases that the injured plaintiff might have expected to receive in the future had he not been injured." The latter justification we interpreted in *State v. Guinn*, 555 P.2d 530, 546 (Alaska 1976), to refer to "those non-scheduled salary increases and bonuses that are granted as one 'progresses in his chosen occupation' in terms of skill, experience and value to the employer." Furthermore, in *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 933 (Alaska 1977) we noted that "[w]hile the first reason may be of questionable validity, the constantly increasing wage factor still justifies

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[2]Even the $240,000.00 figure is extremely favorable to the plaintiffs. They had sold, in total, over the 13-year period they owned this claim prior to trial, only 34 tons of rock for which they had received gross receipts totalling approximately $1,620.00. Most of this material was quarried after Alyeska's taking, which raises the question of whether there does not remain sufficient rock to fulfill the reasonable requirements of the Fairbanks market for this type of rock for the indefinite future. There is no other evidence in the record on this point. In my view, using sales projections based on the rock's value as decorative stone is unrealistic in this case because as a practical matter it could never be sold at such prices in the quantities involved here.

the *Beaulieu* result." I read these cases as limiting the rule of *Beaulieu* to the loss of future earnings in personal injury actions since that is the only area in which the second justification exists. This was apparently the conclusion of the court in *City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216, 226 (Alaska 1978) where we stated:

> *Beaulieu* has limited applicability to contract cases; and we decline to follow it in damage awards for loss of future profits since the impact of inflation on the profit margin is unclear. Receipt of the profits prior to the time they would have accrued but for the breach allows an opportunity for investment of the same.

Since it is clear to me that the jury award of $1,900,000.00 is excessive and cannot be supported by any reasonable interpretation of the evidence, I would remand this case to the superior court with directions to order a remittitur or a new trial.

APPENDIX C

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

ALYESKA PIPELINE SERVICE COMPANY, *Appellant and Cross-Appellee,*	)	
v.	)	File No. 4536/4539
WHITTEN H. ANDERSON and RONALD R. THOMAS, *Appellees and Cross-Appellants.*	)	

Superior Court File 77-764

On consideration of appellant's motion for a stay of appellate proceedings, filed September 10, 1979, and appellees' opposition to the motion, filed September 21, 1979,

IT IS ORDERED:

The motion for stay is denied. Entered at the direction of an individual justice at Juneau, Alaska, October 8, 1979.

CLERK OF THE
SUPREME COURT

Connie Staska
Chief Deputy Clerk

Filed and entered 10/8/79
SUPREME COURT of the
State of Alaska
Robert D. Bacon, Clerk

By _____ Deputy

cc: Counsel, Justices

APPENDIX D

Transcript, October 23, 1978, at 8-10

THE COURT: So you can tell me what you want. I've read the memorandum about the stay. I think we ought to hear it now.

MR. PEARSON: Okay, Your Honor. I have very little to add to what's already contained in the memorandum.

The BLM at the instigation of the state has commenced a validity investigation. The basic validity investigation extends for a period of roughly about 30 days. It's thereupon transmitted to their superiors in Anchorage, and that process normally takes about 15 to 30 days. Then there is the basic decision as to whether the claim is valid or invalid.

We believe that due to the fact that the BLM is the expert administrative tribunal which handles these matters on a regular basis, and given the fact that they have expert witnesses who are able to develop data according to the federal guidelines, that — as they would be appropriate, both so that this Court will have appropriate data before it, and also so that there is a determination by the administrative tribunal that handles these matters before the Court. If it finds in plaintiff's favor, I suspect that that will be a very very weighty consideration in plaintiff's favor. If it finds in defendant's favor, that should be a weighty consideration in the defendant's favor.

I also note to the Court that the Superior Court's decision would not be binding upon the federal government in these matters. So that there is a possibility of inconsistent rulings. One at the state court level. One at the federal level.

THE COURT: What's the determination being made by the federal administrative agency?

MR. PEARSON: The determination is whether a valid location of a mining claim has occurred on — under common (indiscernible) grounds, and also under whatever other grounds might occur to the Bureau of Land Management.

So it involves the very issue in front of this Court.

THE COURT: Mr. Silvey?

MR. SILVEY: Thank you, Your Honor. First of all, I've never seen anything in writing from BLM, neither has my client about ability determination. I have contacted and spoken to two engineers from the Bureau of Land Management, who are now doing a mineral survey or a summary of a mineral survey of this claim. And I think it's to determine whether or not there is a valid mining claim there.

The representation by Mr. Pearson as to the determinations of what will be made there and how it will bind this Court should be determined right now, because this is totally misleading the Court on what we're going to be doing in this trial.

Regardless of what happens, the Bureau of Land Management's determination, which — when Mr. Pearson says it's 30 days, is, I think, a misrepresentation also. But regardless of what happens to that, even presuming the Bureau of Land Management had come in yesterday, and said there was no valid mining claim on the land and the minerals that we're claiming have been converted, that would still not change in any way our claim against the defendant in this case. The reason being that our claim is based on possession. A possessory right. Possessive claim. There's a federal statute which prohibits exactly what the defendant is attempting to do in this case, and that is he's attempting to say that because the title is in the United States, and because the United States will not transfer title to my client, therefore, my client has no rights whatsoever in that piece of ground, even though he's been setting on it for eight years. Even though he'd been setting on it eight years when his client came in and converted the minerals from it.

The idea that — what we're going to do and what our claim's based on is possession. So we . . .

THE COURT: Excuse me. The motion to stay is denied. That's all we have in this case, right? Are the summary judgment motions to be argued at some time?

MR. PEARSON: They haven't been set for argument, Your Honor. We could take them up at the pre-trial or some other time, but whenever you feel is appropriate.

THE COURT: You may be excused.

Transcript, October 26, 1978, at 23

THE COURT: Well, I think the fact that the lease might be admissible as evidence as to what the defendants thought about who owned the mining claim, but not to the proof of the claim. I find that it's necessary for the plaintiff to case the line, and prove that they had a valid mining claim.

Transcript, November 2, 1978, at 757-58

THE COURT: All right. Now, first let's go back to 11 and 12.

MR. SILVEY: If they're both given together, I don't have any objection, Your Honor.

THE COURT: All right.

MR. PEARSON: Your Honor. Perhaps my only notation as to this No. 11 and 12, is that there're basically two tests that must be applied in this — in conjunction with the building stone. First of all, you have the generalized section 22 tests: The marketability tests, that's specified in paragraph 12, but in addition to these requirements — that the plaintiffs bear that burden — that they must also bear the burden as to the tests of uniqueness, as contained in section 11.

Well, I guess my basic concern is that the jury might not be fully apprised as to the distinction between those two tests. They may have a tendency to meld them together and not recognize that those are two separate and distinct requirements. Under the law.

That could probably be remedied by simply an insertion in section 12 that in addition to determining issue of uniqueness and determining whether a deposit otherwise constitutes a valuable mineral deposit — two basic tests are used.

Let's see. Perhaps some better language might be more appropriate.

In addition to establishing special and distinct economic value . . .

THE COURT: Wait a minute.

MR. PEARSON: Yes, sir.

THE COURT: With respect to No. 12, there are two different tests.

MR. PEARSON: Well, actually one is kind of subsidiary to the other. The marketability test is assumed as a special aspect of (indiscernible) test, but I would guess that's probably correct.

THE COURT: Tell me how you want the instruction changed.

MR. PEARSON: Okay. I believe we did that in our proposed instructions.

Transcript, November 3, 1978 at 775

THE COURT: All right. I'm going to give the No. 6 — and we'll just add on to No. 7 that defendants have the burden of showing that it was a good faith taking.

MR. BRIGGS: Yes, Your Honor.

THE COURT: All right. I'm not going to give your No. 1, which I ruled on yesterday — I'm not going to give 2, 3, 4 and 5. I think that 11 and 12 are sufficient.

We'll be in recess for 10 minutes. I'm going to go up and give her those instructions.

Transcript, November 3, 1978 at778

MR. BRIGGS: Okay. And just for the record, we would know our objection for failure to give that, also our . . .

THE COURT: Right.

MR. BRIGGS: . . . objec — exception to the failure to give 2 through 5 I believe it is . . .

THE COURT: Right.

MR. BRIGGS: Okay. I think that we are all together then.

THE COURT: All right. I'll be right back.

(Off the record)

APPENDIX E

Serial Number
F-60553

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

State ALASKA

MINERAL REPORT

Validity Examination
of the
Greenstone #1 Mining Claim

Claimants: Whitten H. Anderson
Ronald R. Thomas

This report is the result of a validity examination and should not be used for purposes other than that for which the report was prepared.

LANDS INVOLVED

20 acre portion w/in Sec. 22, T. 5 N., R. 3 W.,
Fairbanks Meridian

10 October 1979
(Date)

By
John J. Kato, Yukon Area Geologist,
Fairbanks District Office

Technical Review **Management Review**

INTRODUCTION

This mineral report presents the findings of field investigations, record searches, court depositions, and other research efforts concerning information relative to the validity of a mining claim located by Whitten H. Anderson and Ronald R. Thomas. The mining claim, known as the Greenstone #1, is situated astride the Elliott Highway at about Milepost 34.6 Mile, north of Fairbanks, Alaska. (See Maps 1 and 2, Appendix A.) This case was initiated as a result of litigation involving a civil trespass action between the claimants (plaintiffs) and the Alyeska Pipeline Service Company (defendant). Additionally, the Alaska State Department of Transportation and Public Facilities, in its letter of October 2, 1978, requests the Bureau of Land Management to make a mineral validity determination on this claim because of a possible conflict between it and a right-of-way issued by the Bureau of Land Management on December 20, 1977, for the Elliott Highway realignment and roadway improvement project.

BACKGROUND AND LAND STATUS

The Greenstone #1 Mining Claim was originally located on public lands, which were open to location for mining claims, on September 6, 1966, in Sec. 22, T. 5 N., R. 3 W., Fairbanks Meridian, and recorded with the Fairbanks Recording District on September 6, 1966 (see Enclosure 1, Appendix B), as a lode building stone claim by Whitten H. Anderson and Ronald R. Thomas. An Affidavit of Annual Labor was filed on this claim for 1967 (see Enclosure 2, Appendix B). Then, on March 23, 1968, the claim was relocated within the same section by the same claimants, and recorded with the Fairbanks Recording District on March 27, 1968 (see Enclosure 3, Appendix B) as a placer claim by Whitten H. Anderson and Ronald R. Thomas. Subsequent to this relocation, Affidavits of Annual Labor have been recorded with the Fairbanks Recording District each assessment year from 1969 through 1979 (see Enclosures 4-14, Appendix B). The claim was recorded with the Bureau of Land Management under the provisions of FLPMA on September 27, 1979 (see Enclosures 15-16, Appendix B).

On at least two occasions, the above claim appears to have been overstaked. Charles F. Herbert located sixty-six (66) contiguous lode claims on or about October 12, 1967 (portions of which overlay the Greenstone #1 Claim), and recorded them with the Fairbanks Recording District on January 9, 1968 (see Enclosure 17, Appendix B). He also recorded at least one Affidavit of Annual Labor for the 1969 assessment year (see Enclosure 18, Appendix B) before abandoning these claims. And, Walter S. Largent and Charles McMahon located six contiguous lode claims on or about October 21, 1969 (portions of which overlay the Greenstone #1 Claim), and recorded them with the Fairbanks Recording District on October 23, 1969 (see Enclosure 19-20, Appendix B). No Affidavits of Annual Labor were recorded on these claims, but on April 8, 1975, the Alyeska Pipeline Service Company purchased these claims by statutory quitclaim deed from the claimants (see Enclosure 21, Appendix B).

The Greenstone #1, located by W. H. Anderson and R. R. Thomas, lies astride the Elliott Highway Right-Of-Way, which was authorized by Department of the Interior Secretarial Order #2665 of October 16, 1951. Secretarial Order #2665 provides for a one hundred (100) foot Right-Of-Way extension on each side of the center line of the State Highway. This right-of-way width is therefore excluded from the Greenstone #1 Claim as located, and the claimants have no mineral rights within it under the mining laws.

On December 28, 1971, Public Land Order 5150 withdrew the lands surrounding the Greenstone #1 Claim to establish a utility and transportation corridor for construction of the Trans-Alaska Pipeline from the North Slope to Valdez. This order also segregated the land from mineral entry, except for metalliferous minerals.

Later, when construction of the Pipeline began, two Bureau of Land Management realty actions were issued which involved the Greenstone #1 Claim. On November 5, 1974, a Right-Of-Way (F-20572) was issued to the Alyeska Pipeline Service Company to construct an access road from the Elliott Highway to the Pipeline Right-Of-Way. This access Right-Of-

Way cut across part of the Greenstone #1 Claim, but was issued under the provisions of Public Law 167 of 1955, which allows surface management actions on unpatented mining claims which do not interfere with the claimant's mineral rights on said claim(s). And, on April 15, 1975, a Temporary Use Permit (F-21574) was issued to the Alyeska Pipeline Service Company to establish a disposal site. The one hundred sixty (160) acre disposal site permit area encompasses part of the Greenstone #1 Claim, but the delineated work limits within the permit area are wholly outside the claim. No activity took place on the Greenstone #1 Claim as a result of this T.U.P.

After the Bureau of Land Management issued the above access road Right-Of-Way (F-20572), the Greenstone #1 claimants apparently entered into some negotiations with the Alyeska Pipeline Service Company, which culminated in the signing of a lease and agreement between the two parties on September 16, 1975 (see Enclosures 22-25, Appendix B). The lease and agreement provides for construction and use of the access road across the Greenstone #1 Claim in exchange for an annual rental of one thousand dollars ($1,000.00) per year for three years, with an extension option for two additional years. No provision for extraction of material from the claim is mentioned in the lease and agreement.

On December 20, 1977, the Bureau of Land Management issued a Right-Of-Way (F-23288) to the Alaska State Department of Transportation and Public Facilities for an Elliott Highway realignment and roadway improvement project. This Bureau of Land Management Right-Of-Way and Department of Transportation and Public Facilities project directly conflicts with the Greenstone #1 Claim and the rights of the claimants under the mining laws and amendments. This conflict resulted in the Department of Transportation and Public Facilities request that the Bureau of Land Management initiate the mining claim validity investigation of which this report is a part.

In July of 1978, W. H. Anderson and R. R. Thomas initiated a civil lawsuit against the Alyeska Pipeline Service Company,

charging them with unlawful trespass and removal of mineral material. Later in the fall of 1978, this suit (Case No. 77-764) went before the Superior Court for the State of Alaska, Fourth Judicial District, which ruled in favor of the plaintiffs (Anderson and Thomas) in the amount of one and nine-tenths (1.9) million dollars. The defendant (Alyeska) has appealed this decision to a higher court, and the outcome is pending.

The Greenstone #1 Claim was initially examined by myself and Clyde Murray (Fairbanks District Geologist) on August 15, 1978. All corners of the claim were readily located, due to recent brushing and flagging of the claim boundaries, and a geologic reconnaissance of the claim and its surrounding area was completed. All workings and areas of disturbance on the claim were examined. No Location Notice was in evidence on the claim. On October 7, 1978, another field examination was made by myself and Clyde Murray with the claimant (W. H. Anderson) and his attorney (C. D. Silvey, Jr.) present. The claimant on this occasion was asked to identify the boundaries of his claim, to identify his discovery points, to identify the specific mineral or mineral commodity constituting his discovery, and to describe his mining method. He responded to these enquiries to our satisfaction. This information will be addressed in more detail further on in the report.

LOCATION AND DESCRIPTION OF THE PHYSICAL ENVIRONMENT, FLORA AND FAUNA

The Greenstone #1 Claim is located on the Elliott Highway at about Milepost 34.6 Mile. It is about thirty (30) air miles northwest of Fairbanks and is accessible to two-wheel drive vehicles by the Elliott Highway, a two lane unpaved State Highway, from Fairbanks. It is about a forty-five (45) mile drive from central Fairbanks. It is not accessible by fixed wing aircraft. (See Maps 1 and 2, Appendix A, and aerial Photos 1 and 2, Appendix C.)

The claim is within the headwaters of the Globe Creek watershed (tributary of the Tetalina/Tolovana Rivers), which lies in the Yukon-Tanana Uplands physiographic province.

The topography in this area is characterized by rounded ridges surmounted by some bedrock outcrops and flanked by gentle slopes. These ridges and adjacent streams generally trend northeast to east in orientation. Ridge crest altitudes vary between one thousand five hundred (1,500) to three thousand (3,000) feet (four hundred fifty-seven (457) to nine hundred fifteen (915) meters) and rise five hundred (500) to one thousand five hundred (1,500) feet (one hundred fifty-two (152) to four hundred fifty-eight (458) meters) above adjacent valley floors. Valleys are generally flat, alluvium-floored, and one fourth to one half mile (four tenths (0.4) to eight tenths (0.8) kilometers) wide to within a few miles of the headwaters. The streams and rivers of the area flow to the southwest through the Minto Flats and thence into the Tanana River.

The climate of the Yukon-Tanana Uplands province is continental in nature. Summer Fahrenheit temperatures range from the upper 30's to the upper 60's (about 3 to 20 ° C.), with extreme temperatures over 90 ° F. (32 ° C.) not uncommon. Winter temperatures range from the -20's to +20's (about -29 to -7 ° C.) with extreme low temperatures in the -60's not uncommon. Solar radiation varies from about twenty-one hours/per day in summer to three hours/per day in winter. Winds are generally well below five knots, and from the north from September through May, and slightly above five knots, and from the southwest from June through August. Rainfall averages about twenty-three inches annually with the largest monthly amount (three to five inches) occurring in August. Snowfall averages about eighty inches annually, with the largest monthly amounts (five to twenty inches) occurring in December and March. Fall freeze occurs about the beginning of September and lasts through the middle of May for an annual average of about two hundred sixty days.

The vegetation in the surrounding area is the upland spruce-hardwood forest type. It consists of a fairly dense forest of white spruce, birch, aspen, and balsam poplar. Black spruce usually replaces white spruce on north-facing slopes and poorly drained flat areas. Undergrowth in this type normally consists of mosses and grasses on drier sites and brush on moist

slopes. Typical species are willow, alder, ferns, rose, highbush cranberry, lingonberry, raspberry, currant, Labrador tea, horsetails, and tussocks in low, poorly drained areas.

Mammals in the area include the pine squirrel, marten, varying hare, fox, wolf, black bear, moose, and occasionally, the caribou, grizzly bear, lynx, and wolverine. Birds include the upland game birds (willow ptarmigan and spruce grouse), passerines (finches, buntings, longspurs, ravens, warblers, and chickadees), raptors (goshawks, red-tailed hawks and occasionally bald or golden eagles) and an occasional waterfowl species. A few Peregrine falcons (endangered species) are known to nest in the Grapefruit Rocks area (five miles/eight kilometers north of Greenstone #1).

GEOLOGICAL SETTING

In the vicinity of the Greenstone #1 Claim, the Yukon-Tanana Uplands are underlain by a belt of highly deformed Early Paleozoic (five hundred (500) to six hundred (600) million years before present) sedimentary and metamorphic rocks containing conspicuous limestone units overturned and overthrust to the north. The lithologic units include argillite, siltstone, shale, slate, phyllite, greywacke, schist and quartzite.

During Early Paleozoic time, what is now referred to as the Yukon-Tanana Uplands was part of a tectonic and structural element known as the Cordilleran Geosyncline. Throughout Early Paleozoic (500 to 600 m.y.b.p.) time, great thicknesses of marine sediments were deposited in the Geosyncline. Some tectonic deformation accompanied this deposition and resulted in the inclusion of clastic materials. Overlying these strata is a sequence of Cambrian (500 m.y.b.p.) through Devonian (350 m.y.b.p.) limestone beds and shale. More deformation occurred in Late Devonian (350 m.y.b.p.) as evidenced by a Late Devonian belt of clastic material in the area. By Late Paleozoic (270 m.y.b.p.) to Early Mesozoic (180 m.y.b.p.) time, an island arc emerged in what is now the general vicinity of the Alaska Range. During the Triassic Period (180-225 m.y.b.p.) this arc system was uplifted and

deformed. Intense volcanic activity accompanied these events and resulted in the deposition of interbedded pyroclastic and marine sediments in the marine basin that is now the Yukon-Tanana Uplands. By Cretaceous Time (125 m.y.b.p.), what is now the Brooks Range became a dominant emergent landmass, and began to contribute sedimentation to the marine basin from the north.

In Late Cretaceous time (80-90 m.y.b.p.), the Brooks-DeLong Mountain area was intensely deformed, forming the presently observed thrust faulting and east-west fold trends. The marine basin (Yukon-Koyukuk Basin) also emerged at about this time, accompanied by volcanism and intense transcurrent faulting (Kobuk, Kaltag, and Tintina Faults). From Late Cretaceous (70 m.y.b.p.) to Early Tertiary (50 m.y.b.p.), large scale movements took place along these faults. By Mid-Tertiary (25 m.y.b.p.), strong uplifting had occurred, forming what is now the Brooks and Alaska Ranges and volcanism continued in the Yukon-Koyukuk Basin. At present, subsidence, along with considerable terrestrial sedimentation, is occurring in the Yukon-Koyukuk Basin, and the Kobuk, Kaltag, and Tintina Faults remain active.

LOCAL GEOLOGY AND MINERALIZATION

Rock types observed on the Greenstone #1 include slate, argillite, and phyllite with some chert (see annotated aerial Photo #3, Appendix C). The geologic formation comprised of these rock units is thought to be Cambrian in age (500 to 600 m.y.b.p.).

The rock units grade north to south from a slate, to an argillite, to a phyllite. Their foliation strikes generally northeast to southwest and dips steeply to the southeast.

The slate unit varies in color from deep maroon to dark purple with light grayish green interbedded bands or irregular mottlings. It parts readily in one direction along foliation planes, which are oriented about 90° from the relict bedding, but the spacing between easily cleaved planes varies from about one to six inches and some conchoidal fracturing

generally occurs. As it grades gradually to a slaty argillite, its color fades to a dull gray (see snapshots #1-2, Appendix C).

The argillite unit is generally arenaceous, incompetent, and displays slaty foliation in concert with the slate unit. It is medium to dark gray in color and no relict bedding is discernible macroscopically. It grades abruptly to a phyllite (see snapshot #3, Appendix C).

The phyllite unit is highly weathered and fractured with variable foliation which approximates that of the slate and argillite units. Its coloration varies from medium to greenish gray to olive. Some dirty, dark gray chert ribbons are included.

No mineralized zones, metalliferous or otherwise, were observed on the claim.

AREA MINING ACTIVITY

The Tatalina Drainage, of which Globe Creek and the Greenstone #1 are a part, lies between the Tolovana (to the northwest) and the Fairbanks (to the southeast) mining districts. Detailed discussions in several pre-1950 U.S. Geological Survey and U.S. Bureau of Mines publications concerning both of these districts indicated no historical evidence of any mining activity having occurred on Globe Creek or any of its tributaries for any mineral commodity.

The area was undoubtedly thoroughly prospected in the 1910-1920 period, as it lies near the old Olnes/Livengood Overland Trail, but was apparently never staked or worked.

The abandonment of the lode claims staked by C. F. Herbert and those of W. S. Largent and C. McMahon, mentioned above, would also seem to indicate a lack of interest in the area.

DEVELOPMENT WORK

The claimant's indicated "discovery" is an exposure of the more competent purple and green slate. The zone, which Mr. Anderson pointed out, was about three hundred feet long

(N-S) by about ninety feet wide (E-W) with a ridge on the easternmost side. This ridge was an average of about fifteen feet high, with about a 25° slope to the east and about a 35° slope to the west.

Mr. Anderson stated that extraction of the building stone from the outcrop was by hand with pry bars and hammers. Some blasting was attempted, but with unsatisfactory results. Overburden removal was minimal.

All development workings done by Mr. Anderson or Mr. Thomas on the claim, other than line brushing, has been destroyed or masked by subsequent heavy equipment operations. Mr. Anderson stated that this had resulted from both Alaska Department of Transportation and Public Facilities and Alyeska subcontractor activities.

COMMON VARIETY (SALEABLE) VS. UNCOMMON VARIETY (LOCATABLE)

Section 3 of the Act of July 23, 1955 (Public Law 167) amended the Act of July 31, 1947 (Materials Act) by removing common varieties of stone, gravel, pumice, pumicite, or cinders from the category of valuable minerals under the mining laws. In 43 C.F.R. 3711.1(b), the Department of the Interior defined common varieties as follows:

> "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent

with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

Subsequent to the Act of July 23, 1955, and the Department of the Interior's above definition, several pertinent decisions in cases concerned with questionable materials have established the criteria as presently recognized by the courts in deciding the classification of building stone. Among these are:

United States v. Shannon, 70 I.D. 136, 141 (1963)
United States v. U.S. Minerals Development Corp., 75 I.D. 127, 134 (1968)
United States v. Coleman, 390 U.S. 601, 88S. CT. 1327, 1330 (1968)
McClarty v. Secretary of the Interior, 408 F. 2d 907, 908 (9th Cir., 1969)
United States v. California Soylaid Products, Inc., 5 I.B.L.A. 179, 190 (1972)
United States v. Penrose, 10 I.B.L.A. 332, 279 (1972)
United States v. Humboldt Placer Mining Co., 79 I.D. 709, 712 (1972)
United States v. Lee Chartrand et al, I.B.L.A. 70-556, (1973)
United States v. Heden, 19 I.B.L.A. 326, 340 (1975)
United States v. Pope, 25 I.B.L.A. 199, 202 (1976)

CLASSIFICATION CRITERIA

The classification of a building or facing stone as a locatable material as opposed to a common variety material necessitates an affirmative conclusion to the following five inquiries:

1. Does the stone possess some unique property(ies) which gives it distinct and special value over similar types of stone occurring in the area in which the stone is marketed?

2. Does a unique or inherent property(ies) endow the stone with an economic or marketability advantage over competitive stone in the marketing area?
3. Was there a continuous market, other than an occasional sale, for the stone from the date of claim locations to present?
4. Are there reasonable reserves consistent with usual industry practices to serve existing or proposed markets?
5. Is the land on which the stone occurs more valuable for the mineral resource than for other values of the land?

All of the above criteria must be affirmed if the subject stone is to be classed as a locatable material subject to disposal under the United States Mining Laws.

CRITERIA DISCUSSION

1. A comparison of the slate unit from the Greenstone #1 Claim with other similar purple/maroon slate along the Elliott Highway indicates that it displays the best examples in quantity and quality of greenish-gray banding/mottling (relict bedding) accompanied by flat foliation cleavage at about right angles. That is, when successfully cleaved, the resultant slab readily exhibits the greenish-gray banding/mottling as lineations. (See snapshot #4, Appendix C).

From experimentation in attempting to cleave the Greenstone #1 slate on at least four different occasions with a hand sledge and rock chisel, this minerals examiner concluded that only about one half of the slate unit possessed the green lineations, and that about one third of that cleaved with flat surfaces at desired widths (see snapshots #5-#7, Appendix C).

Other deposits of the purple/maroon slate further out the Elliott Highway were less consistent in color (i.e., more dull gray tones to the purple/maroon groundmass and less greenish-gray banding/mottling) and the foliation planes were not at right angles to the bedding, which resulted in cleavage difficulties (shattering, conchoidal fracture and breakage along lineations).

The above attributes of the Greenstone #1 slate, together with its closer proximity to the Fairbanks area and ease of accessibility, indicates some merit in the comparison with other similar slates further out the Elliott Highway and in the surrounding inaccessible area. As to whether or not this merit confers uniqueness and thus distinct and special value in the economic sense is debatable. Whereas the Greenstone #1 slate has had a few sales (see Criteria Discussion (3)), are they significant enough to establish an economic advantage supporting uniqueness over similar slates?

In light of the fact that similar slates have had no past record of claim location or marketing to refute the Greenstone #1 slate's claim of superiority, it is therefore conceded by this minerals examiner that this criterion be considered affirmed.

2. The claimant's contention is that the inherent property of the slate, on the Greenstone #1 to cleave or break from outcrop without drilling, use of explosives or heavy equipment (i.e., ripping with a bulldozer) endows the slate with a marketability advantage (i.e., greater profit margin) over competitive building stones in the marketing area.*

On the basis of three sales totaling less than thirty-four tons over about a thirteen year period (see Criteria Discussion (3)), the claimants have realized a net profit (after all expenses) of between forty to fifty dollars per ton from slate extracted from the Greenstone #1.* Shaw Creek and Fox Building Stone, the leaders (tons/year marketed) in the local decorative stone market, average approximately thirty dollars to forty dollars per ton net profit based on numerous sales totaling in excess of seventy-five to one hundred tons per year.* The current estimate of the total building stone annually marketed in the Fairbanks area is about four hundred tons.*

It is therefore the opinion of this minerals examiner that the above contention, based on the claimant's net profit, albeit higher, does not constitute a finding of economic or marketability advantage over competitive stone in the marketing area. This criterion is thus considered deficient.

*Testimony taken from transcripts of Case 77-764, Anderson/Thomas vs. Alyeska Pipeline Service Company, in the Superior Court for the State of Alaska, Fourth Judicial District.

3. In the thirteen year period since this claim was initially located on the Public Lands (September 6, 1966), the claimants have realized three sales:

> In 1968, about six tons at eighty dollars per ton were sold for a fireplace in the Fox Roadhouse. This tonnage was mined, processed, and transported by the claimants.*
>
> In 1978, about twenty-six tons at forty dollars per ton were sold to a Mr. Walter Burnett for planters, facing, and a fireplace in his new residence. This tonnage was mined, processed, and transported by a mason employed by Mr. Burnett. (See snapshots #8-#10, Appendix C.)*
>
> In 1978, fifteen tons were put on consignment with Fairbanks Sand and Gravel, Inc. This stone was mined, processed, and transported by the claimants and was to be retailed at eighty-five dollars per ton with the claimants receiving fifty dollars per ton. About two tons of this stone have been sold to date. (See snapshot #11, Appendix C).*
>
> The opinion of this minerals examiner is that these three sales, totaling some $1,620.00 minus some costs to the claimants in two of them, does not constitute a showing of a continuous market. This criterion is thus considered deficient.

4. At the time that the field examinations were conducted (fall of 1978), it was estimated that there was in excess of 20,000 cubic yards of the competent slate unit on the Greenstone #1. But, during the 1979 construction season, the Alaska Department of Transportation and Public Facilities, with the authority of a court issued Declaration of Taking, constructed a portion of the realigned Elliott Highway through the claim and directly over the long axis of this yardage. This construction thus removes any portion of the estimated 20,000 cubic yards from the possibility of exploitation. It is the opinion of this

*Testimony taken from transcripts of Case 77-764, Anderson/Thomas vs. Alyeska Pipeline Service Company, in the Superior Court for the State of Alaska, Fourth Judicial District.

minerals examiner, therefore, that the claimants do not have reasonable reserves consistent with usual industry practices to serve any existing markets. This criterion is thus considered deficient.

5. The Elliott Highway realignment construction is a public use project supported by the court's issuance of a Declaration of Taking and financed with State and Federal funds. When compared with some $1,600.00 realized over a thirteen year period for the building stone from the claim, it is the opinion of this minerals examiner that the land is more valuable for use as a right-of-way for a public use highway, than it is for the mineral resource. This criterion is thus considered deficient.

CONCLUSIONS

The investigation concludes that the mineral material from the Greenstone #1 Mining Claim fails to satisfactorily affirm four out of the required five classification criteria necessary for the subject stone to be classed as a locatable material subject to disposal under the provisions of the general mining laws of the United States. It is, therefore, the opinion of this minerals examiner that the stone has been improperly located and disposed of, and should in fact be classified as a common variety (saleable) material.

RECOMMENDATIONS

It is recommended by this minerals examiner that contest action seeking to declare the Greenstone #1 Claim null and void, ab initio, be initiated. The operative charge should be that the material found within the limits of the Greenstone #1 Claim is not a valuable mineral deposit under Section 3 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. 601), hence no discovery has been made.

APPENDIX F

Contest Number
F-60553

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

UNITED STATES OF AMERICA	)	Involving:
	)	
	)	
Contestant	)	
	)	
v.	)	
	)	Green Stone #1
WHITTEN H. ANDERSON and RONALD R. THOMAS,	)	Lode/Placer Mining Claim
	)	
Contestee(s)	)	
	)	

COMPLAINT
(Contest of Mining Claims)

In accordance with Title 43, Code of Federal Regulations, Part 4, Subpart E, the United States of America, acting by and through the State Director, Bureau of Land Management, Department of the Interior, brings this contest against the contestee(s) named above, and alleges:

1. The lands hereinafter described are public lands of the United States.

2. The contestant is informed and believes that the above-named contestees are the owners, or asserts the ownership, of the above-named unpatented mining claim. The contestant is also informed and believes that the contestees are the only parties of interest and that the contestees' addresses are:

Whitten H. Anderson	Ronald R. Thomas
Box 60081	Medical Springs Stage
Fairbanks, Alaska 99707	Baker, Oregon 97814

The contestant is also informed and believes that the contestees are over the age of twenty-one years.

3. Said mining claim is situated in Fairbanks Recording District, State of Alaska, and is further identified as follows:

Fairbanks Meridian, Alaska
T. 5 N., R. 3 W.,
Section 22
Containing approximately 20 acres.

Recording Office

Claim Name	*Book*	*Page*	*Claim Type*
Green Stone No. 1	35	108	Lode
GREENSTONE #1	II	352	Placer

4. So far as known to the contestant, there are no proceedings pending for the acquisition of title to, or an interest in, the above-described lands.

5. Contestant charges separately and collectively that:

1. Material found within the limits of the claim is not a valuable deposit under Section 3 of the Act of July 23, 1955.

2. Minerals have not been found within the limits of the claim in sufficient quantity and quality to constitute a valid discovery within the meaning of the mining laws.

3. The land involved is not chiefly valuable for building stone.

Wherefore, Contestant requests that it be allowed to prove its allegations and that one, or both, of the following actions be taken, as indicated:

1. ☐ The Mineral entry be cancelled.
2. ☒ Said Mining Claim be declared null and void.

NOTICE

This complaint is filed in the Alaska State Office, Bureau of Land Management, 701 C Street, Box 13, Anchorage, Alaska 99513, and any papers pertaining thereto shall be sent to such office for service on the contestant.

Unless contestees file an answer to the complaint in such office within thirty (30) days after service of this notice and complaint, the allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 4, Subpart E, a copy of which is attached.

Dated this 3rd day of April, 1980

UNITED STATES OF AMERICA

By _____
Acting Chief, Branch of Lands and Minerals Operations

Bureau of Land Management
Department of the Interior

APPENDIX G

Federal lands, unless otherwise appropriated, are open for entry and location of mining claims only as to valuable mineral deposits. The term "valuable mineral deposits" has a special meaning with respect to the type of material involved in this law suit. In order for the material involved in this law suit to be classified as a "valuable mineral deposit" it must have a distinct and special value.

In demonstrating that the type of material involved in this law suit has some special and distinct economic value, the plaintiff must show either (1) a unique quality which permits a use for the mineral for which other materials may not be used; or (2) if uses are the same, that some unique quality gives the mineral an economic advantage over competing stone, reflected either in higher price for the stone in question, or alternatively, in lower production costs. That is, the alleged unique quality must result in an economic advantage. In applying the foregoing standards, the inquiry is not limited to deposits of identical stone. Rather, inquiry is made to the availability and price of competing materials used for the same purposes.

In determining whether a deposit constitutes a valuable mineral deposit, two basic tests are utilized. First, there is the marketability test, which requires that a mineral be shown to be marketable at a profit, and moreover marketable at a profit comparable to that obtained by persons marketing competing materials. Secondly, there is a more generalized "prudent-man test": that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Factors relevant to the foregoing considerations include (1) availability of other sources of material to meet market demand; (2) proximity of the material in question to market; (3) quality and quantity of the deposit; (4) accessibility of the deposit; (5) price and cost factors; and (6) actual utilization of the deposit.

APPENDIX H

INSTRUCTION NO. 4

You are hereby instructed that plaintiffs must show that there was an existing market for materials of the quality and quantity contained in the deposit as of the date of discovery. Locations of mining claims based on speculation that there may at some future date be a market for the material are not allowed. The ultimate inquiry is whether in light of prices commanded by the material and costs of removal, processing, marketing, and transportation, a prudent man would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing the mine.

Barrows v. Hickel, 447 F.2d 80, 83 (9th Cir. 1971)
Duval v. Morton, 347 F. Supp. 501, 504 (D. Ore. 1972)
Melluzzo v. Morton, 534 F.2d 860, 863-4 (9th Cir. 1976)

INSTRUCTION NO. 5

You are hereby instructed that in connection with a determination of marketability, actual utilization of a deposit is relevant. Lack of bona fide development of the claim tends to negate assertions of marketability of the material. Moreover, lack of substantial and regular sales, at least if a claim has been held for some time, will raise a presumption that the material was not marketable at a profit on the date of the alleged discovery.

U.S. v. Taylor, 19 I.B.L.A. 9, 19 (1975)
U.S. v. Hallenbeck, 21 I.B.L.A. 296, 300 (1975)
Melluzzo v. Morton, 534 F.2d 860, 862-3 (9th Cir. 1976)
Atchison, Topeka & Santa Fe Railway Co. v. Cox, 4 I.B.L.A. 279, 285 (1972)
U.S. v. Edwards, 9 I.B.L.A. 197, 202 (1973)
Boyle v. Morton, 519 F.2d 551, 552 (9th Cir. 1975)
Barrows v. Hickel, 447 F.2d 80, 83, fn. 5 (9th Cir. 1971)
U.S. v. Shannon, 70 I.D. 136, 141 (1963)

Opposition

Office - Supreme Court, U.S.
FILED
NOV 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

v.

WHITTEN H. ANDERSON AND RONALD R. THOMAS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES D. SILVEY
(Counsel of Record)
MERDES, SCHAIBLE, STALEY & DELISIO, INC.
P.O. Box 810
Fairbanks, Alaska 99707
(907) 452-1855

CLYDE O. MARTZ
HOWARD L. BOIGON
ZACH C. MILLER
Suite 2600
950 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400
Attorneys for Respondents

Of Counsel:
DAVIS, GRAHAM & STUBBS
Suite 2600
950 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

November 14, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

I. Whether the Petition for Writ of Certiorari was timely filed in this Court?

II. Whether this Court should take jurisdiction on certiorari to review procedural rulings and jury instructions affirmed unanimously by a state supreme court and not shown to be of widespread impact or inconsistent with prior interpretations of federal law?

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IN THE

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OCTOBER TERM, 1981

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ALYESKA PIPELINE SERVICE COMPANY,

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v.

WHITTEN H. ANDERSON AND RONALD R. THOMAS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of Alaska

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Whitten H. Anderson and Ronald R. Thomas, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Alaska in this case.

STATUTES INVOLVED

In addition to the statutes reproduced in the Petition, the following rule and statute are involved in this case:

Alaska Appellate Rule 506(b): An original of a petition for a rehearing must be filed within ten days after the filing of the opinion or other decision. The petition must be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. The petitioner shall specifically state which of the grounds for rehearing specified in paragraph (a) exists, and shall specifically designate that portion of the opinion, the brief, or the record, or that particular author-

ity, which the petitioner wishes the court to consider. The petition shall be prepared in conformity with Rule 503(b) and when filed shall be accompanied by proof of service on all parties. No petition for rehearing shall exceed three typewritten pages. No memoranda or briefs in support of or in opposition to a petition for rehearing shall be received unless requested by the court.

28 U.S.C. § 2101(c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

COUNTERSTATEMENT OF THE CASE

In 1966 respondents Anderson and Thomas (hereinafter "respondents") located, pursuant to the Mining Law of 1872, 30 U.S.C. § 22, an unpatented mining claim on open federal lands approximately 45 miles north of Fairbanks, Alaska. The mining claim covered green slate thought by respondents to possess mineralogical characteristics of color, striation, fossilization, cleavability and ease of removal not found in any other geological formation in the Fairbanks area. Respondents profitably marketed slate from their mining claim as decorative building stone in the Fairbanks area, and the uncontroverted evidence in the trial below established that a market for respondents' slate existed in Fairbanks at all times from the date of location of the mining claim to the time the slate was converted by petitioner Alyeska Pipeline Service Company (hereinafter "Alyeska").

Sometime in the winter of 1974-75, without first seeking permission from respondents, one of Alyeska's subcontractors constructed an access road across respondents' mining claim from a public highway to the route of the Trans-Alaska Pipeline

then under construction by Alyeska. After respondent Anderson discovered this trespass in 1975, he and Alyeska negotiated a lease by respondents of the access road to Alyeska for three years at an annual rental of $1,000. The lease contained a covenant by Alyeska against waste to protect the green slate of the respondents on all portions of the claim not within the access road right of way.

Despite the covenant contained in the lease and without the knowledge or consent of respondents, in the spring of 1976 one of Alyeska's subcontractors removed large quantities of slate from respondents' mining claim for use in repairing the pipeline road, dewatering it, and making it passable. Later in the year additional quantities of the slate were removed by Alyeska's subcontractors under direct supervision of Alyeska's restoration engineers "to shore up" vertical support members holding the Trans-Alaska Pipeline and to construct low water crossings in the vicinity of the mining claim. Although the stone from respondents' mining claim was not located in one of the material sites designated for use in pipeline construction activities, it was taken because it was seen as a safer and easier alternative to the taking of restoration material from a designated site near the mining claim. Testimony at the trial below indicated that Alyeska's subcontractors ultimately took between 10,555 and 20,000 cubic yards of stone (or between 25,000 and 46,600 tons) from respondents' mining claim.

Upon learning of this unauthorized removal of stone, respondent Anderson demanded compensation from Alyeska, which was denied. Respondents thereafter filed suit in state court against Alyeska in May of 1977 for damages for conversion and breach of the 1975 lease. In its answer to the complaint, Alyeska made no objection to the jurisdiction of the trial court. Following discovery, trial was set to commence the last week of October of 1978 without objection from Alyeska. On September 29, 1978, only one month before the scheduled trial date,

Alyeska filed in the trial court a motion to stay the trial pending "administrative determination." The motion was premised on an affidavit of Alyeska's counsel that he had been advised that the United States Bureau of Land Management (the "BLM") had reportedly commenced a "validity investigation" of plaintiffs' mining claim and that a field report thereon would be completed within thirty days and would thereafter be transmitted to the Anchorage office of the BLM for review and final disposition "shortly thereafter." No affidavit or testimony of any federal official, or any other evidence, was offered in support of Alyeska's motion. The trial court denied the stay, and the case thereafter proceeded to trial as scheduled.

Alyeska sought to avoid liability to respondents for the admittedly wrongful acts of its subcontractors by claiming as its principal defense at trial that respondents had not located a valid mining claim under the federal mining laws and thus that Alyeska could not be liable in damages to respondents for the removal of stone from the claim. This defense was based on two factual arguments. First, Alyeska contended that respondents had not discovered a "valuable mineral deposit" within the meaning of 30 U.S.C. § 22 because the stone from respondents' claim could not, Alyeska claimed, be marketed at a profit. Second, Alyeska contended that the deposit of stone on respondents' claim did not contain a property giving it "distinct and special value," as required by the Common Varieties Act, 30 U.S.C. § 611, in order to locate claims of common variety minerals under the federal mining laws. Extensive factual evidence was introduced at trial on these issues, and, following a five-day trial, the jury returned a special verdict finding specifically that respondents had discovered a valuable mineral deposit locatable under the mining laws and that the amount of compensatory damages due respondents as a result of Alyeska's tortious acts was $1,911,429.40.

Alyeska thereafter appealed the jury's verdict to the Supreme Court of the State of Alaska. In the meantime, in late 1978 the State of Alaska took possession of respondents' mining claim in the course of widening the right-of-way for the public highway adjacent to the claim. After respondents threatened an inverse condemnation suit against the State for this taking, the State of Alaska requested the BLM to contest the validity of respondents' mining claim. Thereafter, in October 1979 (one year after trial of respondents' conversion case against Alyeska) a BLM geologist issued a Mineral Report recommending the initiation of a contest of respondents' mining claim by the BLM, Pet. App. E at 44a,[1] and six months later, on April 3, 1980, the BLM initiated a contest in accordance with the recommendation. Pet. App. F at 59a. Respondents in the meantime had filed an inverse condemnation action against the State of Alaska for the taking of their claim. The State thereafter intervened in the BLM contest as a party in August 1980; Alyeska did not intervene in the BLM contest.

In its appeal of the jury's verdict in the conversion action brought by respondents, Alyeska requested the Supreme Court of Alaska to stay the appeal proceedings pending investigation and adjudication of respondents' title by the BLM. That stay was denied, and Alyeska thereafter argued in its brief on the merits to the Alaska Supreme Court that the trial court had erred in denying Alyeska's pretrial motion for a stay. On June 5, 1981, the Alaska Supreme Court issued its Opinion affirming the jury's verdict. Pet. App. B at 3a. The court rejected Alyeska's assertion that the trial court should have stayed the trial, holding (i) that 30 U.S.C. § 53 permitted maintenance of respondents' action to recover damages to their mining title regardless of the fact that paramount legal title to the mining

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[1] Citations to the Appendices contained in the Petition for Writ of Certiorari filed herein will be abbreviated "Pet. App."; citations to the Appendices contained in this Brief in Opposition will be abbreviated "Resp. App."

claim remained in the United States under the mining laws and (ii) that the trial court's decision was an appropriate exercise of discretion in light of Alyeska's inability to establish at the time of its motion whether or when the BLM would initiate a contest or would issue a decision with respect to the validity of respondents' title. Pet. App. B at 20a-23a.

Following the decision below by the Alaska Supreme Court, on August 20, 1981, the BLM contest was dismissed with prejudice upon a Memorandum of Understanding executed by all parties to the contest, *i.e.*, respondents, the State of Alaska, and the United States. Resp. App. II. That Memorandum of Understanding provided that (i) respondents would relinquish their title to the mining claim, (ii) the United States would request dismissal of the BLM contest and would not contest the validity of respondents' title to the mining claim prior to their relinquishment of title, (iii) the state court inverse condemnation proceeding would be dismissed, and (iv) the State of Alaska would pay to respondents $14,750 in full settlement of their condemnation claim against the State. All of these steps have since been taken, and thus all controversies regarding the validity of respondents' title have been settled to the satisfaction of respondents, the United States, and the State of Alaska, all the parties claiming interests in that title.

Notwithstanding the agreement of the United States to recognize the title of respondents to the mining claim prior to their relinquishment of title, Alyeska on September 11, 1981, filed an interpleader action in the United States District Court for the District of Alaska naming the United States and respondents as defendants and claiming the possibility of double liability arising from its tortious activity on respondents' mining claim. Respondents have filed a motion to dismiss the action for lack of jurisdiction or, in the alternative, for judgment on the pleadings. The United States has filed a response which supports respondents' motion to dismiss on jurisdictional grounds and on

the additional ground that Alyeska is collaterally estopped from relitigating the question of title to the mining claim. Thus, judgment should be entered in favor of respondents in that action directing Alyeska to pay only to respondents the damages awarded by the jury below.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Petition For Writ Of Certiorari Was Not Timely Filed.

The Opinion of the Supreme Court of the State of Alaska was issued on June 5, 1981. Pet. App. B at 3a. Under Alaska Appellate Rule 506(b), a petition for rehearing must be filed within ten days following issuance of the opinion. Alyeska, however, filed its petition for rehearing of the decision below on June 16, 1981, or *eleven* days following issuance of the opinion. Pet. App. A at 1a. Accordingly, the petition for rehearing was not timely filed under the Alaska Appellate Rules. Under Rule 20.4 of the Rules of this Court, therefore, the time for filing a petition for writ of certiorari from the decision below ran from the date the judgment was rendered, *i.e.*, June 5, 1981, and not from the date of denial of the petition for rehearing. Since the Petition for Writ of Certiorari was not filed in this Court by September 3, 1981 as required by 28 U.S.C. § 2101(c) (*i.e.*, 90 days after June 5, 1981), the Petition was not timely filed, and this Court has no jurisdiction to consider it.

II. The Petition Presents No Substantial Issues Of Federal Law.

Alyeska devotes most of its Petition to an attack on the decision by the Alaska state court to retain jurisdiction of this routine trespass case. Alyeska complains that as a consequence of being forced to litigate in state court a trespass case, brought under state law, respondents "will never have to prove that their mining claim is valid before the special tribunal designated by the Congress to determine such matters." Petition at 10. Alyeska claims that this result "seriously undermines the federal

administrative structure for reviewing mining claims" and "removes an entire category of cases from the jurisdiction of the Department of the Interior." Petition at 10. For this reason, according to Alyeska, the trial court erred in refusing to stay the trial below until the validity of respondents' title had been determined by the BLM.

Alyeska further claims that the failure of the court to give one of Alyeska's proposed jury conditions deprived it of its right to a correct statement of federal law. Petition at 17-19.

In fact, for several reasons these contentions of Alyeska present no significant federal question warranting the concern of this Court.

A. The stay issue has been mooted by the dismissal of the BLM contest.

Even if Alyeska were correct in its assertion that the trial court should have stayed the trial pending initiation and conclusion of a validity determination by the Interior Department, that assertion has been mooted by the dismissal of the BLM contest that ultimately was initiated by Interior. Quite simply, the administrative proceeding which Alyeska urged the trial court to await has now been concluded, and as a result the United States has confirmed the validity of respondents' title for the period during which Alyeska's tortious conduct occurred. Since the United States has agreed not to challenge respondents' title, a holding by this Court that the trial court erred in refusing to stay the trial pending a possible challenge by the United States to respondents' title could not affect the rights of the parties in this case, and "federal courts are without power to decide questions that cannot affect the rights of litigants in the

case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).[2]

All parties with any conceivable claim to title to respondents' mining claim have resolved the title question to their satisfaction. The United States, the State of Alaska, and respondents have all agreed that respondents had title prior to respondents' relinquishment of title in settlement of the BLM contest. (Indeed, the State of Alaska paid respondents a substantial sum in recognition of that title as part of the settlement.) Only Alyeska, a stranger to that title whose only interest in the mining claim stems from its massive theft of rock therefrom, seeks to keep alive the question of title to the claim.[3] Alyeska's effort to infuse this state tort case with federal jurisdictional questions in order to attract the attention of this Court is a transparent

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[2] The mootness of the stay issue is not affected by the fact that dismissal of the BLM contest occurred as the result of respondents' voluntary prospective relinquishment of title. The mootness of this issue depends rather upon the simple fact that the relief requested by Alyeska could in no way affect the present or future rights of the parties to this case. DeFunis v. Odegaard, 416 U.S. 312, 318 (1974). "[A]n actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973).

[3] Alyeska, which was not a party to the BLM contest, states in its Petition to this Court that it has "appealed" the dismissal of the contest to the Interior Board of Land Appeals and has requested the Secretary of the Interior to "assume jurisdiction over the contest." Petition at 9. Since all parties to the contest agreed to its dismissal, and since Alyeska was never a party to the contest, it is not apparent how Alyeska may "appeal" dismissal of the contest. See 43 C.F.R. § 4.410 (1980) (only a "party to a case" may appeal action of an Administrative Law Judge to the Interior Board of Land Appeals). It is also not apparent how or why the Secretary of the Interior would assume jurisdiction over a contest that is no longer in existence by reason of a dismissal with prejudice initiated and approved by the Interior Department.

attempt to defer its accountability for the damage it caused. Its claimed exposure to double liability as a result of the decision below is a smokescreen, since the United States has disclaimed any interest in the damages awarded to respondents by virtue of its agreement not to contest respondents' title during the period of Alyeska's tortious acts. The interpleader action filed by Alyeska in the United States District Court for the District of Alaska is an obvious effort to continue the illusion of double liability while Alyeska's petition is pending in this Court. The disclaimer by the United States not only eliminates any possible liability of Alyeska to the United States, but it also moots the stay issue by rendering the relief sought by Alyeska in this Court meaningless: no purpose could be served by a holding that the trial court should have stayed the trial pending challenge by the United States to respondents' title when the United States has agreed not to challenge that title. Under these circumstances, there is no viable issue for this Court to consider.

B. The decision below has no impact on the authority of the United States over the public lands.

Alyeska does not explain in its Petition how the decision below deprives the Department of the Interior of jurisdiction to take any action it deems appropriate with respect to mining claims on federal lands. That is not surprising, for the decision has no such effect. If it had, the United States would doubtless have joined Alyeska in seeking review of the decision below. That it has not is obviously a recognition that no interest of the United States was adversely affected by the decision. To the contrary, the United States in fact initiated a contest of respondents' title a year and half *after* the jury verdict in this case. Since the United States was not a party to the state court proceeding, no right or interest of the United States could have been affected by it, and the question of validity of respondents' title vis-a-vis the United States would have been resolved in the contest. *See Duguid* v. *Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963).

The law has long been settled that the state and federal courts have jurisdiction to resolve disputes between rival locators of the same mining claim or between a locator of a claim and a trespasser. By locating a mining claim, a prospector acquires possessory title only, with the paramount legal title remaining in the United States. *See Union Oil Co.* v. *Smith*, 249 U.S. 337, 348-49 (1919). Although the Department of the Interior has plenary authority to determine (subject to judicial review) the validity of the possessory title claimed vis-a-vis the United States, *see Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963), *Cameron* v. *United States*, 252 U.S. 450 (1920), the state and federal courts have jurisdiction to resolve mining title disputes between private parties. *Duguid* v. *Best, supra; Graham* v. *Superior Court*, 131 Cal App. 579, 21 P.2d 621 (1933). Congress has confirmed that jurisdiction unequivocally by providing in 30 U.S.C. § 53 that

> [n]o possessory action between persons, in any court of the United States, for the recovery of any mining title, *or for damages to any such title*, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. [Emphasis added.]

In *Duguid* v. *Best, supra*, the Court of Appeals for the Ninth Circuit held that this statute as well as uniform authorities permitted the bringing of a trespass action in state court by the owners of a mining claim against an irrigation district. Noting that there was a dispute between the parties in that case as to "the nature of appellants' [the claim owners] possessory interest" since defendants claimed that plaintiffs had not made a valid discovery on the claim, the Ninth Circuit held that the state court could resolve the possessory interests at stake by "determin[ing] the mineral or non-mineral character of the land and the question of whether discovery has been made, where such a determination is necessary to settle the controversy before it." 291 F.2d at 239. This determination, the court noted,

would affect only the possessory rights of the litigants and *not* the paramount title of the United States. *Id.*

The Ninth Circuit in *Duguid* v. *Best* was satisfied, as was the Alaska Supreme Court in this case, that the exercise of jurisdiction by a state court to determine the validity of a mining title in a dispute not involving the United States did not deprive the Department of the Interior of its jurisdiction over the public lands or impair that jurisdiction in any way. Indeed, the cases are legion in which the validity of title to a mining claim has been determined in actions between private parties where the United States was not a party, and in such cases the establishment by plaintiff of the validity of his claim will support the award of damages to him for injury to the claim. [4] Alyeska has cited no authority to the contrary. If the rule were otherwise, the owners of mining claims would have no remedy for invasion of their property rights by claim jumpers or trespassers unless and until they were able to persuade the United States to initiate contest proceedings or unless they themselves initiated protracted patent proceedings. Alyeska has not identified any statute of the United States or the decision of any court requiring this result or disabling the state or federal courts from litigating trespass cases affecting mining claims.

There is thus no issue of primary jurisdiction in this case, notwithstanding Alyeska's belated efforts to inject it. [5] Respondents do not dispute, and the decision below does not affect, the plenary authority of the Interior Department over the public lands or the jurisdiction of the Interior Department to determine

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[4] See, e.g., McFeters v. Pierson, 15 Colo. 201, 24 P. 1076 (1890); J. E. Riley Inv. Co. v. Sakow, 110 F.2d 345 (9th Cir.), cert. denied, 311 U.S. 659 (1940); Smpardos v. Piomba Const. Co., 111 Cal. App. 2d 415, 244 P.2d 435 (1952); Aurora Hill Con. Min. Co. v. 85 Mining Co., 34 F. 515 (C.C.D. Nev. 1888); see generally 4 *American Law of Mining* § 21.8, at 126.

[5] Alyeska did not object to the jurisdiction of the state court in its answer to plaintiffs' complaint or otherwise during the proceedings in the trial court.

the validity of possessory mining claim titles vis-a-vis the United States. When the United States perceived itself to have an interest in the validity of respondents' title, it initiated a contest of that title, regardless of the fact that a decision upholding that title had been rendered by the Alaska state court.

Thus, the stay issue raised by Alyeska in this case, when stripped of the jurisdictional facade erected by Alyeska in its Petition, resolves itself simply to the question whether the trial court abused its discretion in refusing to grant Alyeska's stay motion. That is an issue of state law, and the Alaska Supreme Court resolved that issue in respondents' favor. In view of the fact that the motion was filed only one month before trial; was based only on unsubstantiated hearsay offered by Alyeska's counsel; and would, if granted, have delayed the trial for an indefinite period while the United States decided whether to initiate a contest and thereafter during the several years of administrative and judicial proceedings that final resolution of such a contest would have involved,[6] that decision by the Alaska Supreme Court was eminently correct. Even if it was not, however, the issue is one of state law only and presents no issue of federal law for this Court to determine.

C. The adequacy of the jury instructions presents no substantial question of federal law.

Alyeska claims that it was deprived of its right to a correct statement of federal law by the alleged failure of the trial court to give a jury instruction which would have told the jury that marketability of stone from respondents' mining claim had to be shown as of the date of discovery. Petition at 17-19.[7]

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[6] In its opinion below, the Alaska Supreme Court noted that BLM contests often take several years to resolve, and cited one example of a contest, not even involving judicial proceedings, which lasted nine years. Pet. App. B at 20a n.19. See also United States v. McClarty, 17 I.B.L.A. 20 (1974) (13 years from initiation of contest to dismissal, including judicial review).

[7] Alyeska complains that the failure of the court to give this instruction allowed the jury to consider "speculative testimony" about the stone that

The Alaska Supreme Court agreed with Alyeska that its proposed instruction correctly stated the law with respect to the marketability test. Pet. App. B at 15a. However, the court held that Alyeska's proposed instruction on this point was adequately covered by other instructions given and that there was no need to instruct the jury again on this point. *Id.*

It is not error for a trial court to refuse to give instructions which merely amplify those correctly stating the applicable law, *Southern Pacific Co.* v. *Souza*, 179 F.2d 691, 695 (9th Cir. 1950), or the substance of which has already been given. *Grand Trunk R.R.* v. *Ives*, 144 U.S. 408, 432 (1892); *New York, L. E. & W. R.R.* v. *Winter*, 143 U.S. 60, 75 (1892).[8]

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could be marketed from their claim in the future. Petition at 18. The marketability rule under the mining law requires that there be evidence to support a finding that the mineral in question can be extracted, removed and marketed as of a critical date. United States v. Coleman, 390 U.S. 599 (1968). However, respondents were required under this rule only to introduce evidence that there was a market for the mineral in their claim as of the critical date — here, prior to the removal of stone from their claim by Alyeska — and whether the mineral from the claim could have been sold at a profit in that market. See 1 *American Law of Mining* §§ 4.86-4.88. Respondents were not required to show that profitable operations actually had been conducted on the critical date, only that they *could* have been; the extent of actual development is only evidentiary. *Id.* §§ 4.84, 4.85; see also United States v. Harenberg, 9 I.B.L.A. 77, 80 (1973); United States v. Gibbs, 13 I.B.L.A. 382, 391 (1973). Respondents introduced evidence that there was a market for their stone in the Fairbanks area at all times since 1966, that they had made profitable sales in that market and that they could do so in the future. Under the foregoing authorities, that evidence was clearly sufficient to create a jury question on the marketability of the stone from their claim. The Alaska Supreme Court so held below. See Pet. App. B at 19a-20a.

[8] Indeed, the Court has recognized that it is "much the better practice to refuse to give instructions to the jury, the substance of which has already been stated in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language and meaning the same thing, tends rather to confuse then to enlighten the minds of the jury." New York, L.E. & W. R.R. v. Winter, 143 U.S. 60, 75 (1892).

Thus, the issue raised in this Court by Alyeska is whether the Supreme Court of Alaska erred in holding the proffered instruction cumulative and unnecessary in light of the instructions given by the trial court. Resolution of this issue involves no general principle requiring pronouncement of importance to the public at large. Rather, it involves merely the review and comparison of the unique jury instructions which were respectively refused and given by the trial court in this case to determine whether the applicable law stated in the instructions refused was in fact encompassed within those given. Such reappraisal of these particular jury instructions is of importance only to the parties to this case.

Where the decision of an appellate court involves only an assessment of the record, as did the comparison and analysis of the instructions in this case, this Court has consistently denied certiorari where there has been a "fair assessment" of the record. *See, e.g., N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951). The analysis by the Alaska Supreme Court of the instructions given and refused in this case was clearly more than a "fair assessment." The Alaska Supreme Court painstakingly analyzed the instructions of the trial court on the federal mining law issues since Alyeska in its appeal to that court claimed error in the refusal of the trial court to give several proposed instructions on the requirements of the federal mining laws and attacked all the instructions given (even though the instructions given were drafted by Alyeska in the first place). The supplemental instructions proffered by Alyeska were found by the Alaska Supreme Court to be erroneous in part, cumulative in part, and unnecessary, in light of the instructions given, to protect substantial rights of Alyeska. Pet. App. B at 10a-16a.[9]

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[9] The Alaska Supreme Court noted in particular that the instructions of the trial court correctly stated the marketability and "prudent man" tests under the mining laws, Pet. App. B at 11a, and Alyeska has not challenged that

In this context, the issue of the adequacy of the jury instructions presents no substantial question for this Court's consideration. The Alaska Supreme Court agreed with Alyeska's statement of the law on the marketability question raised by Alyeska in its petition to this Court and concluded that such statement was encompassed within the instructions submitted to the jury. Even if the court were wrong in that conclusion, it was a conclusion based on the particular instructions given in this case and not on any sweeping principle of federal law. The certiorari jurisdiction of this Court should not be exercised merely to review and refine jury instructions where a lower court has properly decided the federal question presented by those instructions; that function is more properly reserved to the state courts of last resort or the federal appeals courts. *Cf. Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918) (refusal of trial court to submit certain questions to the jury, which has been upheld by an appellate court, does not warrant sustaining a writ of certiorari where the propriety of submitting those questions depended essentially upon an appreciation of the evidence).

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conclusion in its Petition to this Court. Since the jury was properly instructed on marketability, the failure to give Alyeska's proposed instructions regarding an element of that test could not have been error.

CONCLUSION

For the foregoing reasons, respondents Whitten H. Anderson and Ronald R. Thomas pray that the writ of certiorari be denied.

Respectfully submitted,

CHARLES D. SILVEY
(Counsel of Record)
MERDES, SCHAIBLE, STALEY & DELISIO, INC.
P.O. Box 810
Fairbanks, Alaska 99707
(907) 452-1855

CLYDE O. MARTZ
HOWARD L. BOIGON
ZACH C. MILLER
Suite 2600
950 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400
Attorneys for Respondents

Of Counsel:
DAVIS, GRAHAM & STUBBS
Suite 2600
950 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Dated: November 14, 1981

APPENDIX

APPENDIX I

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
Suite 170, 2020 Hurley Way
Sacramento, California 95825

August 20, 1981

Contest No. F-60553

UNITED STATES OF AMERICA,

Contestant,

v.

WHITTEN H. ANDERSON and
RONALD R. THOMAS,

Contestees.

Involving the Green Stone #1 Lode/Placer Mining Claim also known as GREENSTONE #1 Lode/Placer Mining Claim situated in Sec. 22, T. 5 N., R. 3 W., Fairbanks Meridian, Fairbanks Recording District, Alaska.

ORDER OF DISMISSAL

The captioned matter is hereby dismissed based upon the Motion filed by the U.S. Dept. of the Interior and the Memorandum of Understanding attached to and made a part of the Motion filed August 17, 1981.

/s/ E. KENDALL CLARKE
E. Kendall Clarke
Administrative Law Judge

Distribution:

Charles D. Silvey of Merdes, Schaible, Staley & DeLisio, Inc., P.O. Box 810, Fairbanks, Alaska 99707 (Cert.)

Regional Solicitor, Office of the Solicitor, U.S. Dept. of the Interior, 510 L St., Suite 408, Anchorage, Alaska 99501 (Cert.)

Office of the Attorney General, Transportation Section, State of Alaska, 604 Barnette St., Room 233, Fairbanks, Alaska 99701 (Cert.)

Whitten H. Anderson, Box 60081, Fairbanks, AK 99707

Ronald R. Thomas, Medical Springs Stage, Baker, Oregon 97814

Standard Distribution

MEMORANDUM OF UNDERSTANDING

Whereas the parties in the proceedings styled *Whitten H. Anderson and Ronald R. Thomas* v. *State of Alaska*, No. 4FA-79-59 Civ., Superior Court, Fourth Judicial District, State of Alaska, and *United States of America* v. *Whitten H. Anderson and Ronald R. Thomas*, Contest No. F-60553, United States Department of the Interior, Office of Hearings and Appeals, desire to enter into a full and final settlement of said proceedings,

And Whereas the parties desire to reduce to writing their understanding with respect to settlement of the aforementioned proceedings,

And Whereas this Memorandum of Understanding will provide the parties with a format for execution of settlement of the aforementioned proceedings,

IT IS HEREBY AGREED

1. Whitten H. Anderson and Ronald R. Thomas shall execute a relinquishment to the United States of all right, title, and interest to the Greenstone #1 Lode/Placer Mining Claim which is the subject of the aforementioned litigation.

2. The United States shall request the Administrative Law Judge to dismiss with prejudice the aforementioned contest proceeding. Whitten H. Anderson and Ronald R. Thomas and the State of Alaska shall file with the Administrative Law Judge concurrences to the dismissal with prejudice of said action. If for some reason the dismissal by the Administrative Law Judge should not be with prejudice, then the United States hereby agrees not to contest the validity of the said mining claim with respect to Whitten H. Anderson and Ronald R. Thomas during the period of time which they held the claim.

3. Should the State of Alaska or the United States deem a quit-claim deed conveying whatever interest Whitten H. Anderson and Ronald R. Thomas may have had to said mining claim to the United States to be necessary or desirable, then Whitten H. Anderson and Ronald R. Thomas shall execute said deed.

4. With respect to the aforementioned superior court proceeding, the State of Alaska and Whitten H. Anderson and Ronald R. Thomas agree that it shall be dismissed with prejudice and that the State of Alaska shall pay to Whitten H. Anderson and Ronald R. Thomas the total sum of FOURTEEN THOUSAND SEVEN HUNDRED FIFTY AND No/100 DOLLARS ($14,750.00). Each party shall bear their own costs and attorney's fees, and said sum shall bear no interest. It is contemplated by the parties that said sum shall be paid to Whitten H. Anderson and Ronald R. Thomas, in care of their counsel, on or before September 15, 1981.

5. Upon counsel for all parties executing this Memorandum of Understanding, the State of Alaska shall withdraw the pending Petition for Review in the Alaska Supreme Court. Further the parties to the said court proceeding shall advise the Superior Court of the settlement and the forthcoming dismissal with prejudice of that action.

DATED this 6th day of August, 1981.

STATE OF ALASKA

WILSON L. CONDON
ATTORNEY GENERAL

/s/ E. JOHN ATHENS, JR.
E. John Athens, Jr.
Assistant Attorney General

DATED this 6th day of August, 1981.

MERDES, SCHAIBLE, STALEY & DELISIO, INC. Attorneys
for Whitten H. Anderson and
Ronald R. Thomas

/s/ CHARLES D. SILVEY
Charles D. Silvey

MEMORANDUM OF UNDERSTANDING

DATED this 11th day of August, 1981.

U.S. DEPARTMENT OF THE INTERIOR
Regional Solicitor's Office

/s/ ELIZABETH J. BARRY
Elizabeth J. Barry
Attorney-Advisor

APPENDIX II

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

4FA-79-59 CIV.

WHITTEN H. ANDERSON and
RONALD R. THOMAS,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

**STIPULATION FOR
DISMISSAL WITH PREJUDICE**

COME NOW the parties by and through their respective counsel and stipulate that the above-entitled action be dismissed with prejudice with each party to bear their own costs and attorney's fees.

DATED this 17th day of August, 1981, at Fairbanks, Alaska.

STATE OF ALASKA

WILSON L. CONDON
ATTORNEY GENERAL

/s/ E. JOHN ATHENS, JR.
E. John Athens, Jr.
Assistant Attorney General

MERDES, SCHAIBLE, STALEY & DELISIO
Attorneys for Plaintiffs

/s/ CHARLES D. SILVEY
Charles D. Silvey

ORDER

It is so ordered this 17th day of August, 1981.

/s/ JAY HODGES
Jay Hodges
Judge of the Superior Court

FILED in the Trial Courts
State of Alaska, Fourth District

August 17, 1981

WAYNE W. WOLFE, Clerk, Trial Courts

By _____ Deputy

Petitioner's Reply Brief

Office - Supreme Court
FILED
DEC 3 1981
ALEXANDER L. STEVAS
CLERK

No. 81-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,

v.

WHITTEN H. ANDERSON AND RONALD R. THOMAS,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RICHARD A. HELM*
CHARLES P. FLYNN
NELSON G. PAGE
BURR, PEASE & KURTZ
810 N Street
Anchorage, Alaska 99501
(907) 279-2411
Attorneys for Petitioner

* (Counsel of Record)

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ADDITIONAL AUTHORITIES INVOLVED

In addition to the authorities already cited in the Petition and Opposition, the following authorities are involved in this Case:

Alaska Appellate Rule 502(b). Extensions of Time. When by these rules or by a notice given thereunder or by order of the Appellate Court an act is required or allowed to be done at or within a specified time, the Appellate Court may in its discretion, either on motion of a party, showing good cause, or *sua sponte:*

(1) Extend the time period, either before or after its expiration or

(2) Validate an act done after the expiration of the time period.

Motions to extend a time period, or to validate an act done after the expiration of the time period, must comply with Rule 503. Time periods specified in the Appellate Rules, including time periods for doing an act or filing a document in the trial court, may be extended only by the appellate courts and not by the trial court.

43 C.F.R. 4.21(a) Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately.

ARGUMENT

I. RESPONDENTS HAVE RECEIVED A $2,500,000 WINDFALL BECAUSE OF ERRONEOUS APPLICATION OF FEDERAL LAW IN THE STATE COURT.

The Alaska Superior Court's failure to grant a stay in this matter raises a federal question which Respondents have thus far refused to address: can a state court determine the validity of a mining claim under federal law in a trespass action where there is no ongoing trespass or continuing damage and the administrative steps leading to a determination of title by the special federal administrative tribunal have begun. Respondents have ignored the central legal foundation of their case, *i.e.*, that they were required by the state court to prove that their mining claim was valid under federal law. They ignore the fact that administrative determinations were being made concurrently by the appropriate federal agency. This was thus not a "routine trespass case" as Respondents suggest.

Respondents understandably attempt to dismiss the case as lacking in importance. There are thousands of mining claims in the United States. If the rule suggested by the Alaska courts and applied in this case becomes law, it can be expected that

the actions of Respondents in bringing a suit for damages while sidestepping the Bureau of Land Management and its review will become common practice where damage claims are asserted. The Bureau of Land Management will thus be effectively cut out from determining the validity of numerous claims, while defendants will be subjected to state court damages actions which may be based on frivolous or obviously unviable assertions of mining title by plaintiffs.

Petitioner is not claiming that the state court does not have jurisdiction to decide the claim for damages here involved, once the federal agency given special jurisdiction over federal mining claims has determined the validity or invalidity of the Respondents' mining claim. Petitioner merely suggests that the state court was required to defer the validity question to a federal agency before acting on Respondents' complaint. The cases are legion in which this Court has reversed a state court ruling because the state court failed to defer to a federal body where appropriate. *Astiazaran v. Santa Rita Sand & Mining Co.*, 148 U.S. 80 (1893); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

Both the Respondents and the Alaska Supreme Court relied on the Ninth Circuit case of *Duguid v. Best*, 291 F.2d 235 (9th Cir. 1961), for the position that a state proceeding could continue concurrently with a federal administrative action. *Duguid* may or may not have stated the proper rule applicable in that case. Regardless, the case has no application to the facts here, for the question presented to the Ninth Circuit in *Duguid* was precisely opposite of the question presented here: In *Duguid* the Appellants were seeking to enjoin a federal administrative proceeding pending a state court determination. Here, of course, the stay requested was of a state action pending a federal proceeding. The result in *Duguid* was consistent with recognition of the federal administrative agency as a special tribunal; the refusal by the Superior Court to grant a stay in this case was not.

The language in *Duguid* relied upon by the Superior Court and the Alaska Supreme Court is dicta in any case. The specific holding of the Ninth Circuit in *Duguid* was based upon a

determination that the validity of the mining claim in that case was not in question in the state court. 291 F.2d at 240. In this case, of course, the validity of Respondents' mining claim was the central issue in the state case.

Respondents also argue that the erroneous jury instructions given by the Superior Court do not give rise to a federal question, and suggest that this Court need not review the question since it turns upon an analysis of the record. Ultimately, of course, every question regarding jury instructions falls in the same category, as the appropriateness of a given instruction must depend upon the state of the record. Nevertheless, that does not deprive the question presented in this petition for certiorari of importance. Respondents were permitted by the Superior Court to introduce speculative testimony about potential future markets for their stone, in contravention of the rule, not disputed by Respondents, that material from a mining claim must be marketable at the date of discovery to satisfy federal requirements. This evidence was virtually the sole evidence available to demonstrate marketability of the stone. The question presented for review here is whether the Superior Court was required to fully and correctly state the nature of the marketability test with respect to the date upon which marketability must be established. As Respondents point out, the Alaska Supreme Court did review the instructions given by the Superior Court and pronounced them adequate. That, of course, is the reason this petition has been filed. They were not adequate, for they failed to mention a crucial element of the federal test for validity of mining claims. Respondents' arguments thus miss the point: Petitioner is not objecting to the failure to give a more specific instruction amplifying a correct general instruction. It objects to the failure to give an instruction which properly stated the rule of law. Having determined that it was going to decide this question under federal law, the Superior Court was under a duty to properly instruct about that law. *Garett v. Moore-McCormack Co.*, 317 U.S. 239, 245-46 (1942).

II. THE RESPONDENTS' WAIVER OF RIGHTS DOES NOT MAKE THIS ACTION MOOT.

Respondents argue that because they have voluntarily relinquished their title to the mining claim and entered into a stipulation to dismiss the contest action filed by the United States, the issues raised in the petition for certiorari are moot.

This argument is conveniently myopic. There is still outstanding a judgment for $2,500,000 against Petitioner which Respondents obtained because of an erroneous ruling by the Alaska Superior Court. Since that judgment was obtained erroneously, it should be overturned. The fact that Respondents have voluntarily stipulated away a right which they might otherwise have had—*i.e.*, their opportunity to subsequently determine the validity of their title via the contest action, does not change the fact that a substantive right still remains to be affected by this judgment. If it is determined that the state court could not properly have made the determination it did, and the case is remanded, Respondents will have, for technical and tactical reasons, given up their right to attempt to prove in the proper forum the validity of their claim. That does not affect Alyeska's right to have federal law properly applied to this case; it only indicates Respondents' evaluation of their chances in establishing the validity of their claim before the Bureau of Land Management.

Respondents also suggest that the petition for certiorari is moot because the requested relief—*i.e.*, review by the Department of the Interior—has been made. Respondents conveniently overlook the effect the Superior Court's decision had on the course of the administrative proceeding. It is extremely unlikely that Respondents would ever have agreed to give up their mining claim and terminate the contest action if they had not already safely, at least in their own minds, obtained a judgment in state court worth many times what the total fair market value of their mining claim could ever be. The arguments of Respondents point once again to the basic reason why the Superior Court's refusal to grant the stay was erroneous: Respondents have a $2,500,000 judgment against Alyeska for the taking of rock from a mining claim to which

they never had to prove title in any federal forum, and to which they have relinquished all right and title now that they believe they have secured their judgment.

Finally, Respondents have overlooked applicable rules which make their argument incorrect. The federal regulations governing appeal from administrative decisions regarding federal lands specifically provide that "the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 C.F.R. § 4.21(a). The appeal filed by Alyeska is still pending, and is under consideration by the Department of Interior Board of Land Appeals. Until a decision is made by that body, the stipulation for dismissal with prejudice has no effect on the pendency of the action for purposes of this petition for review. Respondents' mootness arguments thus have no merit.

Respondents consider the potential double liability to which Alyeska has been exposed to be nothing more than a "smoke screen" (Respondents' Brief in Opposition at 10). Respondents argue that the interpleader action filed by Alyeska is merely "an obvious effort to continue the illusion of double liability" (*id.*), and argue that the United States has agreed not to seek damages against Alyeska.

Unfortunately, arguments of Respondents' counsel are not commitments by the United States. Despite numerous opportunities to do so in the context of the interpleader action, the United States has yet to pledge that it will not seek to recover against Alyeska. Indeed, statements of Respondents' counsel in the brief in opposition can be usefully compared with statements made by counsel in opposition to Alyeska's appeal before the Board of Land Appeals. There, Respondents have taken the position that "even if Alyeska has to pay twice for this removal, it will be nothing short of what they deserve." (Contestees' opposition to "appeal" of Alyeska in Appeal of Alyeska Pipeline Service Co., IBLA #82-20, at 11.)

III. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

In arguing that Alyeska's petition for rehearing before the Alaska Supreme Court was not timely filed, Respondents once again overlooked applicable rules which make their argument incorrect. Alaska Rule of Appellate Procedure 502(b) provides that the court may "either on motion of a party, showing good cause, or *sua sponte* .... (2) Validate an act done after the expiration of the time period." Any question about the timeliness of the petition for rehearing should be resolved by the action of the Alaska Supreme Court, which considered the petition for rehearing to have been timely filed, and acted upon it without questioning its timeliness. The actions of Respondents should also be considered. Their objection to the timeliness of the petition for rehearing has never been raised before. Since the petition for rehearing was timely filed and considered by the Alaska Supreme Court, the time for filing a petition for certiorari began running on July 14, 1981, and the petition for certiorari was thus also timely filed.

CONCLUSION

Respondents have attempted to sidestep the main issues raised in the petition for certiorari. The stay issue is not moot so long as Alyeska faces the possibility of having to pay a $2,500,000 judgment to Respondents and so long as it faces the possibility of dual liability on the same facts to the United States Government. The stipulated dismissal of Respondents in the United States, now on appeal, was merely a knowing, tactical waiver of rights by Respondents. The fact that Respondents may have intentionally waived their rights to proceed upon remand does not make this case moot. The stay issue involves an important question of federal law, *i.e.*, whether a state court could determine the validity of a federal mining claim in a state action while a federal administrative action was ongoing regarding the same question. Finally, the jury instruction issues involve fundamental questions regarding the rights

of the parties to an adequate and complete instruction on federal mining law. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

RICHARD A. HELM*
CHARLES P. FLYNN
NELSON G. PAGE
BURR, PEASE & KURTZ

Attorneys for Petitioner

*(Counsel of Record)